72: EMPLOYER UNFAIR PRACTICES

"Unfair labor practices are those matters enumerated in **39-31-401 and 402 MCA.** [See] **Ford v. University of Montana 598 P.2d 604 (1979)**." **ULP #19-80**

"Pursuant to Section **39-31-401 MCA**, it is an unfair labor practice for a public employer to; (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section **39-31-201 MCA; (2)** dominate, interfere, or assist in the formation or administration of any labor organization; (3) discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization; (4) discharge or otherwise discriminate against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under Title 39 Chapter 31 MCA; or (5) refuse to bargain collectively in good faith with an exclusive representative." **ULP #24-87**.

"Language similar to that in Section **39-31-401 MCA** has been described as a broad remedial provision that guarantees that employees will be able to enjoy their rights secured by the collective bargaining law, including the right to utilize the processes established by that law without fear of restraint, coercion, discrimination, or interference from their employer. Such language has been liberally construed as prohibiting a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities. See ***Bill Johnson Restaurant v. NLRB*, 113 LRRM 2649, 46 US 731 (1983)**." **ULP #24-87**.

72.1: Interference, Coercion and Restraint

"It was not proven that teachers affiliated with the Association were treated in a manner inconsistent with the practices the Board directed toward the non-affiliated members of the teaching staff." **ULP #14-76**

"[F]ew cases in the federal sector have turned on a consideration of Section **8(a)(1)** alone. The trend has been to consider questions of Section **8(a)(a)** coercion." **ULP #2-79**

The NLRB adopted the rule that "'motive is not the critical element in a section **8(a)(1)** violation…. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the act.' [**Cooper Thermometer Co., 154 NLRB 502, 59 LRRM 1767 (1965) p. 10**]" The Board of Personnel Appeals adopted "the same rule, with respect to **39-31-401(1) MCA** violations." **ULP #3-79**

According to "Section **39-31-401(1)** … [it is an] unfair labor practice for a public employer to: 'interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in **39-31-201**…'." **ULP #44-79**

See also **ULPs #7-77, #19-77, and #19-79** and **ULP #3-79 Montana Supreme Court (1982).**

Was there an independent, as opposed to derivative, violation of §**39-31-401(1), MCA**? "'Such a violation is established by showing (1) that employees are engaged in protected activities, (citation omitted); (2) that the employer's conduct tends to "interfere with, restrain, or coerce employees" in those activities, (citation omitted); and (3) that the employer's conduct is not justified by a legitimate and substantial business reason, (citation omitted).' ***Fun Striders, Inc.,* 686 F.2d at 661-662**. We held above that the employer's conduct was justified by a legitimate and substantial business reason. Therefore, there can be no independent violation of §**39-31-401(1), MCA**. The District Court properly reversed the Board of Personnel Appeals order finding unfair labor practices." **ULP #34- 82 Montana Supreme Court (1986).**

"In the view of the National Labor Relations Board motive is not an element in a Section 8(a)(1) violation. In ***American Freightways Co.*, 124 NLRB 146, 44 LRRM 1302 (1959)** the Board set forth the test for determining such violations: 'It is well settled that the test of interference, restraint and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act....'" **ULP #29-84**.

"The Board of Personnel Appeals has recently addressed the question of motive and its relation to Section **39-31-401(1) MCA** violations in ***Missoula County High School Education Association, MEA v. Missoula County High School District*, ULP 34-82** where it stated: 'To the extent that it is possible to summarize the standards which may be extracted from the section 8(a)(1) and 8(a)(3) cases which have been cited in counsels' briefs and noted above, one could say that where the effect of the employer's action upon section 7 rights is significant, motive is irrelevant. In that type of case the establishing of a legitimate business justification is of no avail. Where the effect is minor, however, the action will be deemed to be justified when significant and legitimate interests of the employer are shown.'" **ULP #29-84**.

"If the City of Missoula violated Section **39-31-401(5)** which is the equivalent of 8(a)(5) of the NLRA, it is elementary that a violation of 8(a)(5) entails derivatively a violation of Section 8(a)(1), but the converse is not necessarily true. R. Gorman *Labor Law* 132 (1976)." **ULP #6-86**.

"I have found a violation of Section **39-31-401(1) MCA**. However, 401(1) (equivalent to Section 158(a)(1) of the federal statutes) 'was intended as a general definition of employer's unfair labor practices. Violations of it may be either derivative, independent, or both.' ***Fun Striders, Inc. v. NLRB*, (9th Cir.**

1981), 686 F.2d 659, 106 LRRM 3076. *Missoula County High School District v. Board of Personnel Appeals, et al.*, ___ Mont. ___, 727 P.2d 1327, 43 St. Rptr 2008, 5 St. Rptr Ed. L. 200 (1986) [ULP #34-82], sets forth the test to determine whether there was an independent or a derivative violation of Section **39-31-401(1) MCA**: (1) that employees are engaged in protected activities; (2) that the employer's conduct tends to interfere with, restrain, or coerce employees 'in those activities'; and, (3) that the employer's conduct is not justified by a legitimate and substantial business reason." **ULP #19-86**.

"Section **39-31-401(1), MCA** is similar to Section 8(a)(1) of the National Labor Relations Act and must be distinguished from Section **39-31-401(3), MCA** which is similar to Section 8(a)(3) of the National Labor Relations Act." **ULP #1-87**.

"The language of 401(1) and (3) are similar, if not identical, respectively to 8(a)(1) and 8(a)(3) of the Federal Act. The protection mandated by 8(a)(1) or 401(1) is the broadest of the five subdivisions framed under employer unfair labor practices. Violations under this first subdivision are regarded as either 'independent' or 'derivative.'" **ULP #8-92**.

"Some employer unfair labor practice acts infringe upon 8(a)(1) only and are not incidental to the violation of the other four subdivisions. These acts are regarded as independent and, therefore, stand alone. The National Labor Relations Board (NLRB) has long noted that, 'a violation by an employer of any of the four subdivisions of Section 8, other than subdivision one, is also a violation of subdivision one.' ***1938 NLRB Ann. Rep. 52 (1939)***. In this matter at hand, the Complainant Union alleged violations of 401(1) and (3). Therefore, the 401(1) charge is regarded as derivative and should a 401(3) violation be found then a 401(1) violation would also be held." **ULP #8-92**.

72.11: Employer Unfair Practices – Interference, Coercion and Restraint – Restrictions on Union Activity [See also 22.5.]

"Where there is a conflict between the employer's right to conduct the public's business and the employees' right to engage in concerted activities, one must balance their respective rights." **ULPs #19-80 and #23-80**

"[T]he employer's right to control the activities of its employees during the workday is supreme to an employee's right to hold a meeting during those working hours without permission." **ULP #19-80**

"Taken together, if all ten counts under the charge had been proved, I must conclude complainant would still have fallen short of convincing me that an unfair labor practice was committed. There was no showing that concerted activities had been affected in the least. Typically these kinds of charges **(8[a][1**] of the NLRA) involve things such as discharge or discipline for

engaging or attempting to engage in protected concerted activity … not … bickering between employees and supervisors." **ULP #23-80**

See also **ULPs #5-77 and #3-79**; and **ULP #3-79 District Court (1981) and Montana Supreme Court (1982)**.

72.112: Interference, Coercion and Restraint – Restrictions on Union Activity – Activities of Employees on Duty

"The only uncontroverted testimony on the subject of [prohibiting talk about the union is] … to the effect that employees could talk about whatever they wished, as long as it did not interfere with their work. Such seems a reasonable policy." **ULP #23-80**

For a supervisor "to ask if a meeting was well-attended does not constitute as interference with union activities…. This inquiry was sufficiently isolated so that it may not be construed to amount to an unfair labor practice." **ULP #23-80**

See also **ULPs #42-79 and #19-80**.

72.114: Interference, Coercion and Restraint – Restrictions on Union Activity – During Work Hours

"The District did not violate … [Section] 401 by reprimanding and issuing a warning letter to Ms. Knippel for calling the April 16 and 18, 1980, teacher meetings … [and] by requiring that meeting on school time be cleared with principals of the three buildings." ULP #19-80

See also **UD #21-78** and **ULPs #42-79 and #23-80**.

72.115: Interference, Coercion and Restraint – Restrictions on Union Activity – Literature Distribution

The Employer seized copies of the contract distributed to the union members. This act is not condoned, but it is deemed so trivial as to not constitute an unfair labor practice. **ULP #12-74**

The use of an unauthorized evaluation form to survey teachers' opinions about one of the District's principals "was protected concerted activity. Whether it violated District Policy is immaterial. If it did in fact violate policy, the policy is wrong and infringes upon basic employee rights under Section 201. Unilaterally adopted policies cannot be utilized to interfere with employee rights." **ULP #19-80**

"The District did violate … [Section] 401(1) … by disciplining Ms. Knippel for distributing the evaluation form." **ULP #19-80**

Referring to various NLRB cases involving literature distribution: "In summary, employees' activities which are directed to improve terms and conditions of employment or otherwise improve their lot as employees are protected even though such activities are channeled outside immediate employee-employer relationships. ***Eastex, Inc. v. NLRB*,...; *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 50 LRRM 2235 (1962)**; ***NLRB v. Electrical Workers (IBEW) Local 1229*, 346 U.S. 464, 33 LRRM 2183 (1953)**." **ULP #19-86**.

72.118: Interference, Coercion and Restraint – Restrictions on Union Activity – Type of Literature

One of the questions this recommended order addressed was "the width and breadth of protected concerted activities when a labor organization has allegedly solicited, compiled and publicly distributed a survey report." **ULP #5-84**

"[S]ince the Billings Education Association conducted a survey subsequent to the Lincoln School Survey, the March 7 letter and the March 9 meeting did not constitute a threat to discipline members for engaging in protected concerted activities in violation of Section **39-31-401(1)MCA**." **ULP #5-84**

72.13: Interference, Coercion and Restraint – Benefits or Reprisals

See **ULP #34-82**.

72.131: Interference, Coercion and Restraint – Benefits or Reprisals – Threats of Reprisal [See also 72.151, 72.17, and 72.55.]

"The Defendant issued the individual contracts during the height of the strike…. What the contract in essence says is, 'sign it and return to work or you are out of a job.' …. Through that contract, the Defendant attempted to coerce the teachers into returning to work and thus giving up their right to strike…. [T]he School District has no right to discharge the teachers and thereby to interfere with the teachers' right to strike." **ULP #17-75**

"If the employer's communication [of his intent to replace striking workers] is an attempt to interfere with his employees' right to engage in concerted activities, then he has committed an unfair labor practice." **ULP #17-75 Montana Supreme Court (1979)**

The School Board was charged with violating Section **59-1605(1)(e)** by: informing the teachers "that they must execute individual contracts" informing them "that by signing the individual contracts they must comply with the Board's final offer and would be subject to all of its terms although the offer was agreed to by the Association; and by engaging "in a pattern of individual bargaining by by-passing the Association which is the exclusive bargaining representative." In

addition, the School Board was charged with violating Section **59-1605(1)(a)** by: threatening the teachers "with discharge unless individual contracts were signed" and using "the public media to announce the teachers' pending discharges in order to coerce their signing." The Board of Personnel Appeals concluded that the School Board had committed an unfair labor practice as charged. **ULP #25-76**

"The individual contracts must not be used to circumvent, delay or hamper any of the rights granted public employees in Section 39…." **ULP #25-76**

At the Christmas party, "the language and manner that Mr. Cady used in inquiring as to who 'was out to get him' were of such a nature as to convey a verbal threat to the employees involved in the conversations and also to other employees." **ULP #41-76**

"[A]n employer's statements are permissible under the following conditions: (1) that the statements contain no threats or promises, express or implied; (2) that predictions made must be beyond the control of the employer; [and] (3) that predictions made must be as to *likely consequences,* be based on *objective fact,* and be *demonstrably probable.*" **ULP #25-77**

"The Defendant on August 5, 1977, threatened to place Association members under personal surveillance or, fire them outright for alleged concerted union activities…. The Kalispell Police Protective Association [KPPA] charged that the City interfered with the protected right of the KPPA to engage in a concerted activity. In this case, there was not a concerted activity (slow-down) implemented by the KPPA. Therefore, I cannot find that the City committed an unfair labor practice." **ULP #27-77**

"[A]n employer's conduct during a union's organizational efforts and up to the actual election is judged more severely than that same conduct would be judged after the labor organization has won the election and is well established as the employees' representative for collective bargaining." **ULP #30-77**

"(1) [T]here was no union organizational effort or pending election affecting either the Complainant or Respondent or their organizations, (2) there was no threat by the Superintendent to take reprisals against the employees; he used the works 'could put further strains…, could lead to more public resentment…', (3) the Superintendent's statement 'strict application of the contract … will make a far less cooperative relationship among teachers and administrators' cannot be construed as a threat to the employees right to file grievances or to any other of their rights." Therefore, these statements were not unfair labor practices. "This is not to say that those same statements made in a different social and political environment and made prior to an election or during an organizational effort could not ever constitute an unfair labor practice." **ULP #30-77**

"With the parties agreeing the teachers were not already employed, with the wages in the individual teaching contracts not being governed by the master labor agreement, with the issuances of the individual teaching contracts having the effect of telling the teachers they may do as they wished but the School District interfered with the collective bargaining process." **ULP #20-78**

"[T]he Defendant amplified the individual bargaining by threatening to withhold wages and, by letter … threatened to terminate employees for failing to sign individual contracts." **ULP #23-78**

"[T]he Employer's action [in laying off 18 full-time staff bargaining unit positions] was 'inherently destructive' of important employee rights, … such action severely undermined union membership, and … if the action was not corrected, it would undermine the Union constituents' confidence in the Union, thereby discouraging Union membership…. [A] violation of 39-31-401(3), MCA has occurred and … the proper remedy must be implemented to restore the proper balance between the asserted business justifications and the employee rights guaranteed by Montana Statute." **ULP #29-79**

"Section **39-31-401(2) MCA** prohibits interference with the formation of a labor organization. One would be hard pressed to find a more classic example of a violation under the section than Commissioner Evans' conduct toward two of the Public Safety Officers. Her threat to abolish the program clearly interfered with the unionization effort…." **ULP #30-80**

"By threatening to cut work hours [of 2 employees]…, by showing [them] a cost comparison between a proposed subcontracting bid from a cleaning company and the cost of the School District doing the same work--eliminating the employee jobs, and by asking [them] to talk to [two other employees] did violate Section **39-31-401(1), MCA** of the Collective Bargaining for Public Employees Act." **ULP #18-82**

"[S]ince the Billings Education Association conducted a survey subsequent to the Lincoln School Survey, the March 7 letter and the March 9 meeting did not constitute a threat to discipline members for engaging in protected concerted activities in violation of Section **39-31-401(1) MCA**." **ULP #5-84**

See also **ULP #37-76**.

"[A]n appointed and duly authorized representative of the Defendant Broadwater County did threaten employees with the loss of their employment should they continue to engage in union activities. This action is a clear violation of Sections **39-31-401(1) and (3) MCA**. ***NLRB v. Sumerset Classics, Inc.*, 29 LRRM 2331 (CA2 1952)**; ***NLRB v. W.T. Grant Co.*, 31 LRRM 2063 (CA9 1952); *Falmouth Co. v. NLRB*, 37 LRRM 105 7 (1955); *Ahern Aircraft,***

***Inc. v. NLRB*, 112 LRRM 3298 (CA1 1983); *Charge Card Assn. v. NLRB*, 109 LRRM 2725 (CA6 1981).” ULP #13-90**.

72.134: Interference, Coercion and Restraint – Benefits or Reprisals – Withdrawal of Benefit

“From the facts stipulated to in this case the conclusion which seems logical is that Defendant’s conduct in paying the twenty teachers for seventeen days which they did not work not stand ready on call in inherently destructive of the rights of the remaining, striking teachers.” **ULP #34-82**

“The conduct of Defendant will affect future bargaining because the realization will be present on the minds of union supporters that the employer will award special benefits to non-strikers, if the union decides a strike is necessary to promote its bargaining goals. A divisive wedge will have been driven between members of the union and work force, if the situation is not remedied.” **ULP #34-82**

“There can be no dispute that annual vacation leave is an ‘accrued benefit.’” **ULP #8-92**.

The Montana State Hospital did not “violate Sections **39-31-401(1) and (3), MCA**, when it canceled pre-approved leaves during the state employee strike at Montana State Hospital.” **ULP #8-92**.

72.151: Interference, Coercion and Restraint – Interrogation – of Employees [See also 72.131, 72.17, and 72.55.]

“These interrogations, questions, inquiries, etc., of Association members about their labor organization activities were clearly in violation of the Montana Act.” **ULP #41-76**

“I find that Mayor Happ did not attempt to require Mr. Gifford to disclose how each individual Association member voted in a secret ballot election.” Therefore, the City of Kalispell “has not violated Section **59-1605(1)(a) and (c) RCM 1947.**” **ULP #27-77**

“It is true that the School District did not discipline anyone or specifically threaten to discipline anyone. But this fact is not the test. The test is whether the interrogation tends to be coercive.” **ULP #5-84**

See also **ULP #23-80**.

72.17: Interference, Coercion and Restraint – Direct Dealing with Employees [See also 72.131, 72.151, and 72.55.]

See **ULPs #11-75, #17-75, #20-76, #25-76, #33-76, #41-76, #25-77, #27-77, #30-77, #16-78, #20-78, #23-78, #11-79, #7-80, #30-80, #34-80, #30-81, #2-82, #18-82, #29-82, and #34-82** and **ULP #17-75 District Court (1978) and Montana Supreme Court (1979).**

"The preponderance of the evidence persuades me to conclude that the District's purpose of requiring President Belangie-Nye's attendance at the August 7th school board meeting was to question her action of giving a statement to the media and to discourage further press statements." **ULP #19-86**.

72.18: Interference, Coercion and Restraint – Other Interference

Derogatory remarks by the Employer about unions do not constitute grounds for a charge of interference. **ULP #8-75**

"In spite of the existence of these [anti-Association] attitudes [held by officials of the School District], it was not proven that teachers affiliated with the Association were treated in a manner inconsistent with the practices the Board directed toward the non-affiliated members of the teaching staff." **ULP #14-76**

"The evidence in inconclusive the [the] Superintendent … had exclusive opportunity and motive to tamper with certain letters [the Montana Education Association sent to teachers in the School District] as there were other persons who had the possible motive and opportunity." **ULP #6-84**

"City street department employee's record of filing grievances affected the judgment of city officials responsible for laying him off and keeping a worker on the payroll who was of the same class, but with less seniority. This constituted an unfair labor practice within the meaning of this section's provision making it an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this chapter." **ULP #3-79 Montana Supreme Court (1982)**

"[T]he School District's act of refusing to accept the Association's authorization form had a significant effect on teachers' right to assist the association. Moreover, I find that the district had no legitimate or significant interest in insisting that its own form be used. The harm done to teachers' interest in assisting the Association far outweighs even the perceived interest of the District. The District's act has created a visible and continuing obstacle to the free exercise of teacher rights under the Collective Bargaining for Public Employees Act." **ULP #29-84**

See also **UD #21-78**.

"[T]he School District's act of refusing to accept the Association's authorization form had a significant effect on teachers' right to assist the Association. Moreover, I find that the District had no legitimate or significant interest in insisting that its own form be used. The harm done to teachers' interest in assisting the Association far outweighs even the perceived interest of the District. The District's act has created a visible and continuing obstacle to the free exercise of teacher rights under the Collective Bargaining for Public Employees Act." **ULP #29-84**.

"I have determined that President Belangie-Nye was engaged in protected activities and that the District had interfered with those activities. Parts (1) and (2) of the test [to determine where there was an independent or a derivative violation of Section **39-31-401(1) MCA**] have been satisfied.... I do not find that requiring President Belangie-Nye to make school budget comments *after* final adoption of the budget justifies a 'legitimate and substantial' business reason. Therefore, there is an independent violation of Section **39-31-401(1) MCA**." **ULP #19-86**.

"The protection afforded employees under Section **39-31-401(1), MCA** is not exclusive to union activity but extends to any group activity for mutual aid or protection. Therefore, Pine Hills School has committed an unfair labor practice if Mike Mahan's discharge interfered with, restrained, or coerced his right to engage in concerted activity. It is not necessary to show that the discharge had the effect of discouraging union membership. It is necessary only to show that the discharge interfered with Mike Mahan's right to engage in concerted activity for mutual aid or protection to show a violation of Section **39-31-401(1), MCA**. ***NLRB v. McCatron*, 216 F.2d 212, 35 LRRM 2012; *NLRB v. Burnup and Si ms, Inc.*, 379 US 21, 57 LRRM 2385**; ***Modern Motors v. NLRB*, 1948 F.2d 925, 30 LRRM 2628**." **ULP #1-87**.

"The preponderance of the evidence submitted during the hearing does not show that the defendant's disparaging remarks about the complainant's union representative, and the defendant's prediction that the complainant was headed down the same road as the air traffic controllers, interfered with, restrained, or coerced employees in their exercise of the rights guaranteed in Section **39-31-201 MCA**. Nor does the preponderance of the evidence show that the aforementioned statement of the employer constituted an unfair labor practice of the employer pursuant to Section **39-31-401 MCA**." **ULP #24-87**.

"Defendant Kurkowski's statements to the complainant's officers and members wherein he responded to being served with unfair labor practice charges by referring to them as 'assholes' and said, 'he hoped he could return the favor' were retaliatory. Likewise his statement to the complainants bargaining committee, 'You guys think you're so smart for filing charges against me, now you're going to stay and negotiate' was also retaliatory. Such retaliatory acts violate Subsections 1 and 4 of Section **39-31-401 MCA**. See ***NLRB v. Vulcan-***

***Hart Corporation*, 106 LRRM 2992, 642 F.2d 255, Ca 8 (1981)**; ***NLRB v. Sure-Tan, Inc.*, 109 LRRM 2995, 677 F.2d 584, CA 7 (1982)**; ***NLRB v. Ford Motor Company,* 110 LRRM 3202,683 F.2d 156, CA 6 (1982)**." **ULP #24-87**.

"The U.S. Supreme Court in, ***Bill Johnson's Restaurants vs. NLRB*, 461 U.S. 731, 113 LRRM 2647 (1983)**, held that although a lawsuit filed by an employer against employees engaged in concerted activity proved to be without merit, that does not mean that the suit was, by that fact itself, an unfair labor practice. Rather, the suit must have been instituted for an unlawful objective with the intent of retaliating against an employee for the exercise of protected rights before a violation of the National Labor Relations Act can be found. In the instance case there was no proof that the Board's purpose in obtaining the injunction was to retaliate against the Association's picketing members or the Association itself. Furthermore, there was no showing that injunctive relief sought by the Board was founded upon an unlawful objective. ***IBEW Local 532 (Brink Construct ion Co.)*, (1988), 291 NLRB No. 69, 130 LRRM 1274.**" **ULP #20-89**.

"The Board of Trustees did not violate Section **39-31-401(1) MCA** when it obtained a restraining order against the Association and enjoined its members from picketing the bank." **ULP #20-89**.

72.2: Domination or Support of Employee Organization [See also 22 and 73.2.]

"Flathead County School District No. 5 violated MCA Section **39-31-401(1) and (2)** … by withholding monies from employee paychecks in the amount of dues of …Montana Education Association without contractual authority or individual authorization, thereby interfering with **39-31-201** rights and dominating and assisting in the formation and administration of a labor organization, namely, the Kalispell Association (KEA) and Montana Education Association." **ULP #2-79**

Encouraging employer domination constitutes an unfair labor practice, but advising employees that they have a right to confer with the employer does not necessarily constitute such an action. **ULP #16-84**

"The test of whether a union is employer controlled is subjective and must be viewed from the point of the employees." **ULP #16-84**

"The National Labor Relations Board generally finds two degrees of violations of Section **8(a)(2)** [comparable to **39-31-401(2) MCA**]. First are those cases where the employer's activity is so extensive as to constitute domination of the labor organization. There the National Labor Relations Board will order disestablishment of the union…. The second class of cases are those where the National Labor Relations Board finds the employer's activity was limited to interference and support which never reached the point of domination. The

National Labor Relations Board in such cases does not order the extreme remedy of disestablishment. In either class of cases, the underlying principle is that the employer engaged in an unlawful means of undermining employee rights to effective bargaining representation of their own choice. Such conduct by the employer goes beyond interference with other protected collective bargaining rights and is aimed at the labor organization as an entity." **ULP #16-84**

See also **ULPs #7-77, #3-79, and #44-79** and **ULP #3-79 District Court (1981) and Montana Supreme Court (1982)**.

"[I]nsufficient evidence was produced to show a violation of Section **39-31-401(2) MCA**. Violations of 401(2) [equivalent to Section 158(a)(2) of the federal statutes] relate to employer domination or interference with or support to a 'labor organization' as opposed to protected concerted activities of individuals in 401(1) violations." **ULP #19-86**.

72.21: Domination or Support of Employee Organization – Recognition Practices [See also 31 and 73.112.]

An employer has the right to insist upon bargaining about a "recognition" clause to define the status of new classifications and reclassifications of employees. The employer's refusal to deduct dues for the newly certified employee representative while a contract with the former union is still in effect is not an unfair labor practice." **ULPs #20-75 and #19-76**

"The employees approached the Mayor with a proposed agreement and after slight modification the City signed the agreement recognizing "the City of Dillon Employees Association" as the exclusive representative of the employees. After this, progress toward negotiations with AFSCME came to a halt. AFSCME's representative… was even refused a copy of the agreement." **ULP #34-84**

See also **ULP #20-78**.

72.22: Domination or Support of Employee Orientation – Election Practices [See also 35.5 and 35.53.]

The mention of the Montana Public Employees Association in a letter to employees did *not* constitute an unfair labor practice, even though it was sent just prior to the election of the bargaining representative, because it could not have affected the election and it only reported relevant facts objectively. **ULP #9-74**

See also **ULP #36-77**.

72.23: Interference, Coercion and Restraint – Domination or Support of Employee Organization – Interference with Internal Union Activities

An employer's refusal to bargain with the representative of the employees' own choosing in effect determines the membership of the union negotiating team and constitutes interference in union activities. **ULP #4-76**

Attempted interference by an employer does not in itself constitute an unfair labor practice. Actual domination must exist in order for employee rights to be affected. **ULP #10-74**

"The act of the Fire Chief in asking his Battalion Chiefs to submit a list of duties which the temporary employees might be able to perform is a far cry from interfering with the effectiveness of the Union as the representative of the bargaining unit members." **ULP #16-84**

See also **ULP #13-76 and #19-80**.

"No authority has been offered or found to support a conclusion that the defendant's October 28, 1987 demand that the complainant immediately call a meeting of its membership to consider the defendant's proposal interfered with the administration of the complainant's labor organization in violation of Section **39-31-401 (MCA)**." **ULP #24-87**.

72.3: Discrimination Related to Union Membership or Concerted Activity

The County Road Boss "did not call Campbell back to work as soon as other employees because of the charge he had filed with this Board. This is clearly a violation of **39-31-401(4)** and had the charge been made we would have found in Campbell's favor. This situation, along with past history, will certainly color any future organizational attempts by employees in Stillwater County…. employees rights under the Montana Collective Bargaining for Public Employees Act are broad and it will behoove the County Commissioners to see that all their supervisors are knowledgeable of employee rights and are careful not to abridge these rights." **ULP #2-85**

See also **ULP #19-77**.

"Section **39-31-401(1), MCA** is similar to Section 8(a)(1) of the National Labor Relations Act and must be distinguished from Section **39-31-401(3), MCA** which is similar to Section 8(a)(3) of the National Labor Relations Act." **ULP #1-87**

See also **ULP #34-87**.

72.31: Discrimination Related to Union Membership or Concerted Activity – Criteria for Determining Violation [See also 43.9, 71.512, and 72.35.]

"The hearing examiner adopts the logic of the U.S. Supreme Court in its determination that an employer will be presumed to have discriminated against the employee for the purpose of encouraging or discouraging union activity if such encouragement or discouragement is a 'foreseeable consequence.' … The 'foreseeable consequence' of terminating Ms. Widenhofer for union activities is the discouragement of union activity…." **ULP #28-76**

"*Mt. Healthy* balanced first amendment rights against the need of a school district to be able to dismiss a person who obviously deserved to be dismissed for permissible reasons…. The *Mt Healthy* 'but for' test is adopted for dual-motivation cases under Montana's Collective Bargaining Act. This adequately protects the interests and rights of both parties." **ULP #28-76 Montana Supreme Court (1979)**

"Basically, the public employer may exercise his right to hire, promote, transfer, assign, and retain employees so long as he does not infringe upon the employees' rights…. The issue is not so much whether there is a legitimate basis for firing…an employee, but whether that basis is the sole reason for the action. Because improper motive distinguishes illegal action from legal action…" **ULP #39-76**

"If I remove all labor activities from the Record in this case, the School Board fails to demonstrate that they would have reached the same decision [not to rehire Velk and Nau] in the absence of such protected labor activities." **ULP #19-77**

"If the discharge was partially motivated by the employee's union activity, it is unlawful." **ULP #12-78**

"[T]o show a violation of **59-1605(1)(c) RCM, 1947**, it is necessary to prove or infer (1) employer discrimination as to hire or tenure of employment or any term or condition of employment; (2) resulting encouragement or discouragement of membership in a union; an (3) unlawful intent…. The necessity of specific evidence of a discriminatory motive depends on which of two categories the employer's act falls into: (1) discriminatory conduct 'inherently destructive' of important employee rights, or (2) discriminatory conduct having a 'comparatively slight' adverse effect on employees." **ULP #16-78**

"**Western Exterminator Co. vs. NLRB (9th Cir. 1977), 565 F.2d 1114** … states the rule that where a discharge is motivated by both a legitimate business consideration and protected union activity, the test is whether the business reason or the protected union activity is the moving cause behind the discharge…. This Court adopted essentially the same test in **Board of**

Trustees of Billings [School District] v. State [Board of Personnel Appeals] (1979)….” ULP #3-79 Montana Supreme Court (1982)

In **Wright Line (251 NLRB 105, 105 LRRM 1169 [1980]),** “the NLRB: (1) Adopted the ‘but for’ test used by the U.S. Supreme Court in **Mt. Healthy City School District vs. Doyle [429 U.S. 274, 97 S.Ct. 568 (1977**)]…. (2) Distinguished ‘dual motivation’ cases from merely ‘pretextual’ cases…. (3) Set forth the following test for dual motivation cases: ‘…First we shall require that … [the Complainant] make a prima facie showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” **ULP #42-79**

“Dual motivation cases should be distinguished from the so called pretext cases where the reasons advanced by the employer to explain a contested discharge were not the reasons for the termination; where the purported good cause was merely a smokescreen…. In dual motivation cases the discharged employee is said to have provided the employer with some cause for disciplinary action. At the same time, however, the evidence indicates the employer also had a discriminatory reason for making the discharge…. The task then is to determine whether the unlawful reason played any part in the decision.” **ULP #10-80**

“Where it is found that the discharge or other discipline imposed by the employer is, in fact pretextual, i.e., there is not a legitimate business justification to be found, a violation of **39-31-401 (3) MCA** may be found without further testing under the dual motive doctrine…. But where the reason for imposing the discipline is twofold, one being a legitimate business reason, the other being a reaction to the employee’s protected union activities; a true dual charge (i.e., insubordination and non-cooperation) was not pretextual and was not a mere sham, is not the equivalent of saying the protected activities did not play a role in the decision. For that reason we must look at the facts as they relate to the two-part test set forth in [Mt. Healthy].” **ULP #10-80**

“Dual motivation cases must first … be distinguished from pretext cases where the reasons advanced by the employer to explain the disciplinary action were not the real reasons, but rather were a mere smokescreen for the true reasons…. The task becomes one of determining what role the protected activity played in the decision of the employer to discipline…. The NLRB, in Wright Line … stated: ‘…Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive’.” **ULP #38-81**

The Mt. Healthy “test requires that the employee show that the protected conduct was a substantial or motivating factor in the employer’s decision to discipline. Once that is done, the burden shifts to the employer to show it would

have reached the same decision even in the absence of the union activity." **ULP #38-81**

"Under the dual motive doctrine the employee is said to have given the employer cause for disciplinary action and the employer is said to have had a discriminatory reason for imposing the discipline. If the facts of the case show both permissible and impermissible reasons for the employer's action, the task then becomes one of determining motivation…. However, when the evidence reveals that the reason purported by the employer is a sham, the justification can be called merely pretextual … and discrimination may be found without further testing under the dual motive doctrine." **ULP #29-82**

"Even though it is unnecessary to go beyond the pretext aspect of the analysis of the employer's assertion, an application of the 'but for' test … renders the same conclusion: the School Board removed Ms. Howe's head teacher duties because of her union activities." **ULP #29-82**

"Specific evidence of the employer's intent to discourage union membership is not necessary in discrimination cases. It is sufficient to presume that the natural consequence of the discriminatory action will chill union activity and membership in the union, **Radio Officer Union vs. NLRB, 347 U.S. 17, 33 LRRM 2417 (1954)**." **ULP #29-82**

See **ULPs #3-73, #4-73, #5-73, #41-76, and #9-83** and **ULP #10-80 District Court (1985).**

72.311: Discrimination Related to Union Activity or Concerted Activity – Criteria for Determining Violation – Anti-Union Animus [See also 72.312 and 72.323.]

The employer's expression of anti-union sentiment (for example, telling two employees that he did not want them to join the union) is considered evidence of anti-union animus and provides the basis for an unfair labor practice charge in the discharge of a union member employee. **ULP #5-75**

The "anti-union bias of Superintendent Wilson … is sufficient to shift the burden to management to prove its innocence." **ULP #12-78**

"Mr. Young was laid off and Mr. Spilde retained by the City because Young had filed a number of grievances…. The City's discriminatory motive was a factor, and probably the dominant factor, in its decision to lay off complainant and thereby violate the agreement. Its actions caused unrest among union members and had the effect of discouraging membership." **ULP #3-79**

"An anti-union was committed when Mr. Croff presented the tainted evaluation [of Ms. Widenhofer] to the trustees." **ULP #28-76 Montana Supreme Court (1979)**

"[W]ith respect to an alleged **39-31-401 (3) MCA** violation and the employer's intent, discriminatory conduct motivated by union animus and having the foreseeable effect of either encouraging or discouraging union membership must be held to be in violation of employee rights." **ULP #10-80**

"Weighing the above evidence by the "but for" test, the record contains only a thread of evidence … that the School District would have not subcontracted the work if the Union did not represent the employees." **ULP #9-83**

"In addition to the employer proving a legitimate business objective, the plaintiff also failed to meet the burden of proof on the question of anti-union motivation." **ULP #2-85**

See **also ULPs #13-76, #28-76, #19-77, #18-78, #42-79, #30-80, #38-81, and #29-82** and **ULP #3-79 Montana Supreme Court (1982).**

"In November 1985, the court entered its findings of fact, conclusions of law and order." One of the court's conclusions of law was that "the Board of Personnel Appeals abused its discretion and committed an error of law in concluding that the payment to the teachers was inherently destructive of protected rights and, therefore, no proof of anti-union motivation was required. . . . 'The Act was not intended to guarantee that business decisions be sound, only that they not be the product of antiunion motivation. . .' We concede that the school district's conduct may have had a comparatively slight impact on employee rights. Teachers may hesitate slightly in joining future strikes. To fin d a violation of §39-31-401(3), MCA, where the discriminatory conduct has comparatively slight effect, '[A]n antiunion motivation must be proved to sustain the charge if (as here) the employer has come forward with evidence of legitimate and "Discrimination has not been shown. Antiunion animus has not been shown." **ULP #8-92**.

"The decision made to terminate Mr. Nau or the other named Association members is not found in any way to have been based on discrimination against the Association or its members." **ULP #29-92**.

72.312: Discrimination Related to Union Membership or Concerted Activity – Criteria for Determining Violation – Knowledge of Employee's Union Activity [See also 72.311 and 72.323.]

Dealing with an employee in the capacity of union steward is a basis for presuming the employer has knowledge of the employee's union activity. **ULP #5-75**

The employer's knowledge of the role of an employee in union activities is seen as a basis for the discrimination charge. **ULPs #5-75 and #15-74**

"Mr. Mueller was suspended because he failed to follow the directives of his employer…. The evidence does not support the charge that the City's decision to discipline Mr. Mueller was illegally motivated by its consideration of his union activities." **ULP #42-79**

See also **ULPs #5-73, #15-76, #28-76, #39-76, #19-77, #12-78, #10-80, #19-80, #38-81, and #29-82**.

See **ULP #1-87**.

72.314: Discrimination Related to Union Membership or Concerted Activity – Criteria for Determining Violation – Notice; Prior Warning

The lack of any indication of dissatisfaction with the employee, plus the fact that other employees were customarily warned and allowed to correct mistakes, provides the basis for an unfair labor practice charge in the discharge of a union member employee. **ULP #5-75**

See also **ULPs #15-76, #41-76, and #42-79**.

"The employer did not show that Mike Mahan was discharged pursuant to any disciplinary/evaluation policy or system. It was not shown that Mike Mahan's performance just prior to termination was substantially more deficient than it had been previously. Nor was it shown that he was subjected to a policy, system or practice of progressive discipline or remedial training to correct alleged deficiencies. Nor was it shown that he had ever been advised that his performance was so deficient as to jeopardize his continued employment." **ULP #1-87.**

72.315: Discrimination Related to Union Membership – Criteria for Determining Violation – Prior Satisfactory Record

"Although a good evaluation and merit increase cannot excuse subsequent misconduct, it seems clear that it should serve as an indication of the lack of seriousness that the City attached to the prior conduct." **ULP #10-80**

"What the NLRB cases do hold is that a prior good record or merit increase serve to indicate, along with other factors, either inconsistency on the part of the employer or that the disciplinary action was in retaliation for union activities rather than for the reason asserted by the employer." **ULP #10-80**

See also **ULPs #5-75, #15-76, #37-76, #19-77, #12-78, and #29-82**.

72.316: Discrimination Related to Union Membership or Concerted Activity – Criteria for Determining Violation – Seniority

The Ravalli County Road and Bridge Department contended that their motivation for discharging the eleven union member employees "was purely economic, and that these particular individuals were selected for discharge because they were less efficient than others with lower seniority in the same category who were retained in [their] employ." The Department violated Section **59-1605(1)(a) and (c)** by discharging five of the employees for their "involvement in union organizational activity" but they "were exercising their prerogatives to operate and manage their affairs as recognized by Section **59-1603**" when they discharged the six other employees. **ULP #4-73**

"Mr. Young was laid off and Mr. Spilde retained by the City because Young had filed a number of grievances…. Young was laid off, Spilde remained (with less seniority as a laborer) and did laborer work, the supervisor stated publicly that he would not rehire complainant, the City had CETA employees doing laborer work, and Young has not yet been recalled." **ULP #3-79 Montana Supreme Court (1982)**

72.317: Discrimination Related to Union Membership or Concerted Activity – Criteria for Determining Violation – Timing of Adverse Action

The discharge of a union steward a month after he had filed five employee grievances is evidence of discriminating for union activity. **ULP #5-75**

See also **ULPs #5-73, #15-76, and #19-77**.

"The timing and sequence of events must be considered. At most, only a few weeks passed between the time that the list of complaints was presented to the employer and the time of Mike Mahan's discharge." **ULP #1-87**.

"[T]he benefit was withheld on the apparent basis of a strike." **ULP #8-92.**

72.318: Discrimination Related to Union Membership or Concerted Activity – Criteria for Determining Violation – Treatment of Similarly Situated Employees

Withholding a salary increment form a teacher while others received increases is not necessarily evidence of discriminatory treatment because of union activities. However, failure to warn an employee of mistakes prior to discharging the employee, when all other employees are given such warning is evidence of such discrimination. **ULP #8-75**

"Employer discrimination consists of treating like classes differently." **ULP #16-75**

See also **ULPs #5-75, #41-76, #19-77, and #34-82.**

"[T]he Board of Personnel Appeals found that the school district discriminated against the strikers solely on the basis of union activity. We disagree. The school district discriminated in favor of the non-strikers because they took the affirmative step of agreeing to teach for eighteen days and forego other options for those days. Moreover, the payments were made more than a year after the strike and only after the threat of a lawsuit. The school district's conduct arose out of a unique situation and is not the equivalent of permanently discharging strikers or granting superseniority to non-strikers. The inherently destructive label simply does not fit this conduct. Therefore, we uphold the District Court's reversal of the Board of Personnel Appeals on this point." **ULP #34-82 Montana Supreme Court (1986).**

72.319: Discrimination Related to Union Membership or Concerted Activity – Criteria for Determining Violation – Other

"It is not clear from the language of the policy that a teacher must obtain approval of the District before accepting office. If such were the case, it would amount to interference. **Hydro-Dredge Accessory Co., 215 NLRB 5, 87 LRRM 1557 (1974)**…. There is sufficient ambiguity in the language of the policy to render it meaningless…." Therefore, there was no violation of **Section 401 (1) or (2)**. **ULP #19-80**

See also **ULPs #19-77 and #3-79, District Court (1981) and Montana Supreme Court (1982).**

"Inherently destructive conduct, in this context, is conduct which carries with it '. . . unavoidable consequences which the employee not only foresaw but which he must have intended' and thus bears 'its own indicia of intent' . . . *NLRB v. Great Dane Trailers*. . . . [T]here was no inherently destructive conduct in this case ." **ULP #34-82 Montana Supreme Court**.

"The employer...had a burden to show by a preponderance of the evidence that Mike Mahan would have been discharged absent his protected activity. The employer has clearly failed to do so. There is substantial evidence that Mike Mahan's participation in the drafting of the list of complaints was a motivating factor in the decision to terminate him. There is substantial evidence that Mike Mahan's concerted, and therefore protected, activity was a motivating factor in Larry Williams' decision to discharge Mike Mahan. The implementation of the decision to discharge interfered with, restrained or coerced Mike Mahan's rights under Section **39-31-201, MCA** and is therefore an unfair labor practice pursuant to Section **39-31-401(1), MCA**." **ULP #1-87**.

72.321: Discrimination Related to Union Membership or Concerted Activity — Basis of Discrimination — Organization Membership

"Information was not offered to support the allegation that any changes or actions taken by the Defendant were because or as a result of Ms. Sisk's union activities. A violation of Section **39-31-401(3) MCA i**s not found." **ULP #7-91**.

See **ULPs #12-88, #27-88, and #29-92**.

72.322: Discrimination Related to Union Membership or Concerted Activity — Basis of Discrimination — Lack of Organization Membership

See **ULPs #12-88 and #27-88**.

72.323: Discrimination Related to Union Membership or Concerted Activity – Basis of Discrimination – Participation in Protected Concerted Activities [See also 21, 61.2, 62.2, 63.1, 64.2, 72.311, and 72.312.]

"There is no doubt that the pressure was on from the parents to get rid of Ms. Widenhofer, and again there is no doubt that the drive to get rid of Ms. Widehofer was a result of her strike activity…. Although it is not contrary to Chapter 16, Title 59 for parents to discriminate on the basis of union activity, it does become an unfair labor practice in the school administration joins in." **ULP #28-76**

See also **ULPs #19-77, #19-80, #23-80, #10-81, #38-81, #29-82, and #34-82.**

"It is not necessary to show that Mike Mahan's concerted and therefore protected activities were the sole reason for his discharge. It is only necessary to show that his protected activity was a motivating factor in his discharge. ***NLRB v. Transportation Management Corporation,* 462 US 393, 113 LRRM 2857**; ***Board of Trustees v State of Montana*, 604 P.2d 770, 103 LRRM 3090**.... He would not have been discharged on November 5, 1986 but for his concerted and protected activity." **ULP #1-87**.

See **ULP # 8-92** and **ULP #34-82 Montana Supreme Court (1986).**

72.324: Discrimination Related to Union Membership or Concerted Activity – Basis of Discrimination – Participation in Union Activities [See also 21.]

"Ms. Karen Jolly was harassed by her supervisor, Mr. Tom Stockstill, because she had filed a grievance with her union." **ULP #37-76**

"No threats of reprisal, implied or expressed, were made because they pursued the contract grievance procedure. The teachers who filed the grievance were treated no differently than those who did not so file. There were no actions

against their protected rights even if one concluded that the School District specifically responded to the filing of the grievance by changing the recess policy. The District had ample reason to desire the change; the arbitrator's award gave rise to the opportunity to effectuate that change." **ULP #39-81**

"It is a violation of the Collective Bargaining for Public Employees Act for an employer to discharge or otherwise discipline an employee based upon the employee's union activity. This Board has consistently held that an unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on an employee's engagement in protected conduct." **ULP #15-83**

See also **ULPs #3-73, #4-73, #5-73, #15-74, #5-75, #28-76, #19-77, #12-78, #3-79, #42-79, #10-80, #15-80, and #23-80**.

See **ULPs #13-90 and #7-91**.

72.331: Discrimination Related to Union Membership or Concerted Activity – Forms of Discrimination – Assignment Practices

The absence of specific contract language indicating work assignment invalidates a charge of discrimination for union activities by reason of work assignment. **ULP #3-75**

An employer is not obligated to assign work to a given individual if it was not intended for him by the contract. **ULP #3-75**

The School District must be barred from ever using active union membership as a consideration for teacher assignments. **ULP #16-75**

See also **ULPs #37-76 and #41-76**.

72.332: Discrimination Related to Union Membership or Concerted Activity – Forms of Discrimination – Constructive Discharge

See **ULPs #19-77 and #18-78**.

72.333: Discrimination Related to Union Membership or Concerted Activity – Forms of Discrimination – Demotion

The demotion of an employee from foreman to regular heavy equipment operator after he took part in union activity prior to unit determination was found to be an unfair labor practice. **ULP #3-73 District Court (1975)**

The removal of Ms. Howe's head teacher duties was in effect a demotion even though her salary was not reduced." **ULP #29-82**

72.334: Discrimination Related to Union Membership or Concerted Activity – Forms of Discrimination – Discharge

"The services of a nontenured school teacher may be terminated without cause, as long as the termination is not because of an impermissible reason …. Since no reason need be given for dismissing a nontenured teacher such as Ms. Weidenhofer, the present case presents a dual motivation problem." **ULP #28-76 Montana Supreme Court (1979)**

See also **ULPs #4-73, 35-73, #19-77, #12-78, #3-79, and #10-80** and **ULP #3-79 District Court (1981) and Montana Supreme Court (1982)**.

See **ULP #1-87**.

72.335: Discrimination Related to Union Membership or Concerted Activity – Forms of Discrimination – Discipline [See also 47.311.]

According to the Weingarten rule, "employee insistence upon union representation at an employer's investigatory interview, which the employee reasonable believes might result in disciplinary action against him, is protected concerted activity." **ULP #16-81**

The Hearing Examiner found that the purpose of the meeting with Ms. Blackman "was much broader than a simple follow-up of the February evaluation …[and that] any employee receiving these letters would fear that the requested interview might result in disciplinary action." Applying the Weingarten rule, she determined that the Employer was in violation of Section 401(1). **ULP #16-81.**

"I found no evidence that indicated Complainant's union activity influenced in any way the Defendant's action of demotion, reprimand or non-hiring. The record does not indicate that the Defendant pressured the Complainant into termination." **ULP #38-80**

"The Billings Education Association alleges that the employer refused to permit a union representative at the March 9 meeting with management which Mr. Jones reasonably believed might result in discipline." This was not a violation of Section **39-31-401(1) MCA** because he, himself, did not request union representation." **ULP #5-84**

See also **ULPs #37-76, #41-76, and #42-79**.

72.336: Discrimination Related to Union Membership or Concerted Activity – Forms of Discrimination – Layoff

"[T]he evidence on the record fails to sustain Slim Campbell's charge that he was laid-off because he was exercising his rights under Section **39-31-201 MCA.**" **ULP #2-85**

See also **ULPs #1-76 and #3-79**.

72.337: Discrimination Related to Union Membership or Concerted Activity – Forms of Discrimination – Permanent Layoff

"This recision of the termination of Mr. Gornick and Mrs. Vanderburg, combined with the lack of any substantial … evidence, directs me to the opinion that the trustees did not violate the law within the meaning of Section **59-1604**." **ULP #8-77**

See also **ULPs #29-79 and #30-80**.

"The reasoning offered by the defendant that Mr. Nau was chosen for nonrenewal based on legitimate business reasons is found credible." **ULP #29-92**.

See also **ULP #1-87**.

72.340: Discrimination Related to Union Membership or Concerted Activity – Forms of Discrimination – Scheduling Changes

The Hearing Examiner did not "find that the City either negotiated with individual employees or changed the work shift unilaterally." **ULP #27-77**

See also **ULPs #5-73, #15-80, and #38-81**.

See **ULP #7-91**.

72.341: Discrimination Related to Union Membership or Concerted Activity – Forms of Discrimination – Suspension

See **ULP #42-79**.

72.342: Discrimination Related to Union Membership or Concerted Activity – Forms of Discrimination – Other

Giving monetary benefits to non-strikers when they are not "on-call" is discriminatory conduct. **ULP #34-82**

The Montana Supreme Court upheld a "District Court order revers[ing] a Board of Personnel Appeals decision that the school district violated §**39-31-401, MCA**, by paying certain non-striking teachers for eighteen days of work where

those teachers had agreed to work eighteen days but actually worked only one day." **ULP #34-82 Montana Supreme Court (1986)**.

See **ULP #8-92**.

72.35: Discrimination Related to Union Membership or Concerted Activity – Defenses Against Charges of Discrimination [See also 43.9, 71.512, 72.31, and 72.32.]

"Respondent City argues that a satisfactory performance rating does not erase prior disciplinary actions…. The District Court's position on this issue was correct and the Hearing Officer should have included evidence of events occurring prior to Carlson's merit increase." **ULP #10-80 Montana Supreme Court (1982)**

"To the extent that it is possible to summarize the standards which may be extracted from the Section 8(a)(3) [NLRA] cases which have been cited in counsels' briefs and noted above, one could say that where the effect of the employer's action upon Section 7 [NLRA] rights is significant, motive is irrelevant. In that type of case the establishing of a legitimate business justification is of no avail. Where the effect is minor, however, the action will be deemed to be justified when significant and legitimate interests of the employer are shown." **ULP #34-82**

See also **ULP #4-73**.

72.351: Discrimination Related to Union Membership or Concerted Activity – Defenses Against Charge of Discrimination – Attendance

"The District did not violate … [Section] 401 … by adopting a policy advising the Association to obtain its approval for time off from work to participate in professional activities." **ULP #19-80**

"The Complainant developed a poor job performance record which caused his demotion, reprimand and subsequent of re-employment with the Defendant." **ULP #38-80**

"Payment for one day the [the non-striking teachers] actually reported for work, June 4th, is not in dispute. When Defendant closed the schools, the school year ended; there was no work to be done nor a need for standby teachers." **ULP #34-82**

"[T]he Board of Personnel Appeals found that the teachers were not on-call and did not make themselves available for work after the first day. The District Court ruled that this finding was clearly erroneous. . . . The facts support an inference that the teachers did make themselves available to work the entire period in

question. . . . By showing up for work the first day, the teachers accepted the offer [in the superintendent's letter] and implicitly agreed to work, and made themselves available, for eighteen days." **ULP #34-82 Montana Supreme Court (1986).**

72.3521: Discrimination Related to Union Membership or Concerted Activity – Defenses Against Charge of Discrimination – Changes in Operation – Subcontracting or Contracting Out

Subcontracting by the employer which meets the tests set forth by the National Labor Relations Board [NLRB] in the Westinghouse case (**150 NLRB 1574, 58 LRRM 1251[1965]**) is a defense against an unfair labor practice charge. **ULPs #3-75 and #4-76**

In Fibreboard Paper Products Corp. vs. NLRB, "[t]he U.S. Supreme Court held that an employer violated Section **8(a)(5) of the NLRA** (**39-31-401(5) MCA**) by unilaterally deciding to subcontract its maintenance work and terminate its own employees…. The Court upheld an NLRB finding that although the company's motive in subcontracting its work was economic, the failure to negotiate with the union over its decision to subcontract constituted a violation of the NLRA … the same reasoning and theory [as in Fibreboard] should be used in this case." **ULP #30-80**

"Contrary to what popular public employer opinion might be, the Collective Bargaining for Public Employees Act was passed for public employees, not employers. Thos management rights listed under **39-31-303 MCA** were not intended to be used by public employers as a shelter under which the duty to bargain in collectively should be avoided." **ULP #30-80**

See also **ULP #18-78**.

72.3523: Discrimination Related to Union Membership or Concerted Activity — Defenses against Charge of Discrimination — Automation, Change of Technology

"The preponderance of the evidence in the record does not show that the reduction in force that resulted in the layoffs of the Complainants was discriminatory and therefore in violation of Section **39-31-401(1)** or Section **39-31-401(3)**." **ULP #14-87**.

72.355: Discrimination Related to Union Membership or Concerted Activity – Defenses Against Charge of Discrimination- Discourtesy to Public

See **ULP #10-80**.

72.358: Discrimination Related to Union Membership or Concerted Activity – Defenses Against Charge of Discrimination – Economic Reasons

Budgetary constraints of the employer are a defense against a charge that lay-offs were the result of discrimination. Poor management practices exacerbated the situation, but did not constitute an unfair labor practice. **ULP #1-76**

"[T]he change in policy was warranted by a business justification. (I agree with that contention.) The evidence shows that the postponing of vacations was related to a desire by the State to get unemployment checks out on time." **ULP #47-79**

"That the School District was faced with the prospect of losing $1.275 million in state aid clearly explains its attempt to open the schools; however, it does not justify disparate treatment toward strikers once it decided to close the schools." **ULP #34-82**

"The Lockwood School District was motivated by the financial savings. It met the 'purpose or intention' restriction of the collective bargaining agreement, Article 2 –Subcontracting." **ULP #9-83**

"The County successfully proved that budget considerations caused all the lay-offs in the winter of 1984-84." **ULP #2-85**

See also **ULPs #1-74, #18-78, and #39-81**.

"The Hearing Examiner disagreed with the school district and found that there was no obligation to pay the teachers except for the one day they worked. Thus, the Hearing Examiner and the Board of Personnel Appeals concluded there was no business justification for paying the claim. We agree with the District Court that that conclusion was an abuse of discretion. . . . [T]he employer's conduct was justified by a legitimate and substantial business reason. Therefore, there can be no independent violation of §39-31-401(1), MCA." **ULP #34-82 Montana Supreme Court (1986).**

See also **ULP #8-92**.

72.359: Discrimination Related to Union Membership or Concerted Activity – Defenses Against Charges of Discrimination – Efficiency of Operation

"[I]f the conclusion were drawn, in spite of the facts on the record, that there was an adverse effect on the teachers' rights, the employer sustained its burden and established a legitimate and substantial business justification for its action. The District's long standing concern with greater safety during recess, coupled with the teachers' availability serve to enforce such determination." **ULP #39-81**

See also **ULPs #18-78, #19-80, and #2-85**.

"The interpretation of the collective bargaining agreement, the employer policy, and State statute place great emphasis on the importance of the hospital operation and, in no manner, discriminates against any employee, group of employees, or union affiliation. The Defendant Employer canceled pre-approved annual vacation leave of all employees — both union and non-union employees.... Legitimate and substantial business justification has been shown." **ULP #8-92**.

"The reasoning offered by the defendant that Mr. Nau was chosen for nonrenewal based on legitimate business reasons is found credible. His work load was assignable to other employees or capable of being completed through computer training programs." **ULP #29-92**.

72.360: Discrimination Related to Union Membership or Concerted Activity – Defenses Against Charge of Discrimination – Incompetence

The School Board's insistence that not giving a salary increment was based upon the incompetence of the teacher was held to be valid despite the poor evaluation system used to determine competency. **ULP #8-75**

"An unsatisfactory employee cannot place himself in a better position because of protected union activities. (**Mt. Healthy City School District Board of Education vs. Doyle, 429 U.S. 274,287 [1977**])." **ULP #12-78**

"[T]he decision to not renew Mr. Carlisle's contract was made primarily on the recommendation of Mrs. Fisher and not because of Mr. Carlisle's union activity." **ULP #12-78**

72.361: Discrimination Related to Union Membership or Concerted Activity – Defenses Against Charge of Discrimination – Insubordination

See **ULPs #42-79 and #10-80**.

72.362: Discrimination Related to Union Membership or Concerted Activity – Defenses Against Charge of Discrimination – Lack of Knowledge of Union Activity

"In the instant case, the trustees had the sole authority to hire and fire teachers…. We hold that the appellants have committed an unfair labor practice despite the trustees' lack of knowledge of Ms. Widenhofer's union activities…. Under the usual employer-employee relationship, there cannot be discrimination unless the employer knows of the protected activity. However … we are not dealing with a usual employee-employer relationship…. [T]heir

decision not to hire in this case was based on a tainted evaluation…. An anti-union act was committed when Mr. Croff presented the tainted evaluation to the trustees. The trustees are responsible for this action by Mr. Croff." **ULP #28-76 Montana Supreme Court (1979)**

See also **ULPs #28-76 and #38-80**.

"Although testimony was given that Mr. Waltmire and especially Mr. Talley were engaged in union activity prior to June 1, 1989, no evidence was presented to indicate any official of the College had any knowledge of Mr. Talley and Mr. Waltmire's organizing efforts prior to June 1, 1989." **ULP #67-89**.

72.366: Discrimination Related to Union Membership or Concerted Activities – Defenses Against Charges of Discrimination – Other

"To the suggestion that the employer would have been perpetrating a fraud upon the twenty teachers if it had not paid them for eighteen days, suffice it to say that, unlike the facts in *Portland Willamette*, … Defendant was under no apparent obligation to pay them beyond 'the completion of the school year.' The school year ended when the trustees closed the schools." **ULP #34-82**

"'The legitimacy of the [school district's] conduct for purposes of the analysis prescribed by *Great Dane* depends not on the truth of the assertions regarding its contractual obligations but rather on the reasonableness and *bona fides* with which it held its beliefs. . . . The Act was not intended to guarantee that business decisions be sound, only that they not be the product of antiunion motivation.' . . . *Vesuvius Crucible Co. v. NLRB*. . . ." **ULP #34-82 Montana Supreme Court (1986)**.

"Here the Hearing Examiner disagreed with the school district's interpretation of the contract but he did not address the reasonableness of that interpretation. We find that the school district made a reasonable interpretation of the contract and paid the claim out of a *bona fide* belief that the claim was valid. The school district paid the claim only after the teacher threatened to file suit to collect. Moreover, the school district's attorney advised the school district that this was a legal claim which should be paid. Finally, we find that the school district; interpretation of the contract was arguably correct. Therefore, we affirm the District Court's reversal of the Board of Personnel Appeals' conclusion that the school district had no substantial, legitimate business justification for the payment." **ULP #34-82 Montana Supreme Court (1986).**

"The initial decision not to re-hire Mr. Talley in February 1989 was based upon his formal assertion of a legal right to teach. Continuing refusal to re-hire Mr. Talley was in response to his on-going right to teach allegations and eventual suit filed in District Court. Cancellation and/or reassignment of classes that Mr. Waltmire had taught were based upon the previous decision to utilize full-time

teachers whenever possible; the request of a full-time instructor for more teaching assignments; or, the lack of student enrollment warranting cancellation of the class. I find no probative evidence which indicates the College retaliated against either Mr. Talley or Mr. Waltmire for their union activity." **ULP #67-89**.

"The record presented is insufficient to support a finding that the Defendant committed an Unfair Labor Practice Charge as identified in the charge submitted by the complaining party on February 23, 1990. The record shows that the Defendant has acted within the confines of the employment contract and any actions taken w ere within contract terms." **ULP #3-90**.

See also **ULP #54-89**.

72.4: Discrimination for Recourse to Board of Personnel Appeals or Court [See also 73.114.]

Section 39-31-401(4) MCA "prohibits employer discrimination against an employee for signing or filing an affidavit, petition or complaint or giving information, or testifying under the Act." **ULP #3-79**

"Filing a grievance under the terms of a contract grievance procedure does not equate to signing or filing an affidavit, petition, or complaint under the act…. However, Mr. Young was discriminated against (for grieving a number of employer personnel actions) when he was laid off and a person with less seniority kept on doing laborer work. And … he was further discriminated against after he filed this unfair labor practice charge because he was not called back by the city." **ULP #3-79**

"Despite the inherent danger of coercion the National Labor Relations Board permits a limited privilege in the investigation of facts concerning issues raised in [an unfair labor practice] complaint. **Johnnie's Poultry Co., 146 NLRB 770, 55 LRRM 1403 (1964), 59 LRRM 2117 (CA8, 1965)**." There was no evidence" to show that the employer did not comply with the safeguards identified by the NLRB in Johnnie's Poultry….. [There was nothing] to show that the employer's attorney went beyond the necessities of preparing his case for hearing; that he inquired into matters of union membership; that he discussed union activities; that he dissuaded employees from joining or remaining as members of the union; or that he otherwise interfered with the rights." **ULP #23-80**

In **NLRB vs. Scriverner (405 U.S. 117, 79 LRRM 2587 [1972]**), the U.S. Supreme Court ruled "that an employer's discharge of employees who gave written statements to an NLRB investigator, but who had not filed a charge or testified at a formal hearing, constituted a violation of the Act." **ULP #10-81**

"It takes more than [Mr. Waltermire's] belief, however, to prove that the School District discriminated against him because he filed a petition with this Board and

was attempting to organize substitute [teachers]…. [T]he School District did nothing to thwart his organization efforts nor did it reduce the number of times he was called because he filed a petition here." **ULP #10-81**

"Principal Garrett issued his April 24 memorandum the day before the summons in ULP #16-81 was received…. Therefore, it is impossible to believe that his memo … was issued in retaliation for the Association filing the charge in **ULP #16-81." ULP #20-81**

"Slim Campbell's [unfair labor practice] charge was filed shortly after he was laid-off… and we cannot extrapolate it to cover his call-back to employment even though it is clear that [the County Road Boss] did not call Campbell back to work as soon as the other employees because of the charge he had filed with this Board. This is clearly a violation of **39-31-401(4)** and had the charge been made we would have found in Campbell's favor." **ULP #2-85**

See also **ULP #3-79 District Court (1981) and Montana Supreme Court (1982).**

"[T]he defendant retaliated against the complainant's officers and members because unfair labor practice charges had been filed." **ULP #24-87**.

72.5: Refusal to Bargain in Good Faith [See also 41.63.]

"Because of the complexity of the issues involved herein and because of the ambiguity of the contract, I do not expressly find the City to be in bad faith for refusing to bargain with the Union." **ULP #14-74**

"If the Board of Personnel Appeals were to judge the sincerity of a proposal it could be forcing one or both parties to make a concession. The Board of Personnel Appeals can only judge if a proposal was made in a good faith intent to reach an agreement." **ULP #20-78**

"[T]he obligation to bargain collectively in good faith does not compel either party to agree to a proposal or require the making of a concession." **ULP #5-82**

See also **ULPs #2-73, #13-76, #13-78, #11-79, and #19-79**.

"If the City of Missoula violated Section **39-31-401(5)** which is the equivalent of 8(a)(5) of the NLRA, it is elementary that a violation of 8(a)(5) entails derivatively a violation of Section 8(a)(1), but the converse is not necessarily true. R. Gorman *Labor Law* 132 (1976)." **ULP #6-86**.

"Good faith bargaining is defined in Section 39-31-305 as the mutual obligation of the public employer or his designated representatives and the representatives of the exclusive representative to meet at reasonable times and

negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a proposal or require the making of a concession. See ***NLRB v American National Insurance Company*, 30 LR RM 2147, 343 US 395, 1952**; ***NLRB v. Bancroft Manufacturing Company, Inc.*, 106 LRRM 2603, 365 F.2d 492, 1941 CA 5**; ***NLRB v. Blevins Popcorn Company*, 107 LRRM 3108, 659 F.2d 1173, 1931 CA DC**; ***Struthers Wells Corporation v. NLRB*, 114 LRRM 3553, 721 F.2d 465, 19 80 CA 3**." **ULP #19-88**. See also **ULPs #14-87, #24-87, #27-88, and #4-89**.

"An employer violates its duty to bargain collectively in good faith when it institutes a material change in the terms and conditions of employment that are compulsory subjects of bargaining without giving the exclusive bargaining representative both reasonable notice and an opportunity to negotiate about the proposed change. See ***NLRB v Henry Vogt Machine Company*, 721 F.2d 465, 114 LRRM 2893, 19483 CA 6**; ***NLRB v Katz*, 369 US 736, 50 LRRM 2177, May 21, 1962**; ***Felbro, Inc., (Garment Workers Local 512) v NLRB*, 122 LRRM 3112, 759 F.2d 705, 1986 Ca 9**; ***American Distributing Company, Inc. v NLRB*, 715 F.2d 446, 1983 CA 9, 115 LRRM 2046, cert. denied, 466 US 958, 116 LRRM 2096**." **ULP #27-88**. See also **ULP #34-87**.

"The unilateral change in Ms. Sisk's hours without bargaining with the union was a *per se* refusal to bargain in good faith, an unfair labor practice.... Laurel Public School, Yellowstone County School District 7-70, is found to have violated Section **39-31-401(1) and (5) MCA**." **ULP #7-91**.

See also **ULPs #19-85, #17-87, #32-88, #7-89, #14-89, #31-89, and #13-90**.

72.51: Refusal to Bargain in Good Faith – Continuous Duty to Negotiate

"The City's refusal to grant Dyer a grievance hearing is then, in effect, a refusal by the City to bargain over conditions of employment … and questions arising under the present collective bargaining contract…. By refusing, and continuing to refuse to bargain collectively with the Union through the use of the contractual grievance procedure, the City … did engage and is engaging in an unfair labor practice within the meaning of Section **59-1605(1)(a**)…." **ULP #2-75**

The part-time nature of a small city government and the press of other city and personal business is no defense against a charge of excessive delay in the conduct of bargaining sessions. However, the Board of Personnel Appeals does not require parties to engage in negotiations which could not, by any reasonable standard, prove fruitful at that time. **ULP #6-76**

"The Supreme Court held that 'Collective bargaining is a continuing process. Among other things it involves … protection of employee rights already secured by contract.' **Conley v. Gibson, 355 U.S. 41, 2 L Ed 2d 80, 85, 78 S.Ct. 99 (1957)**." **ULP #2-75 Montana Supreme Court (1977)**

"Under Montana's Collective Bargaining Act for Public Employees a failure to hold a grievance hearing as provided in the contract is an unfair labor practice for failure to bargain in good faith." **ULP #2-75 Montana Supreme Court (1977)**

"I can find no duty on the part of the employer to negotiate on one section of a contract outside the formal negotiating sessions exclusive of the other issues of the contract." **ULP #7-78**

The School District's refusal to arbitrate the nonrenewal of nontenured teachers "amounted to a failure to bargain in good faith and constituted an unfair labor practice." **ULP #30-79 Montana Supreme Court (1982)**

"[A] contract violation is not a per se unfair labor practice. However … this matter [refusing to strike names on the arbitration list] … rendered ineffective their contractually agreed upon dispute resolving mechanism. This board has consistently ruled that such action constitutes a failure to participate in the ongoing process of collective bargaining and therefore the unfair labor practice of refusing to bargain I good faith." **ULP #5-80**

See also **ULPs #11-75, #25-76, #16-78, #17-78, #18-78, #23-78, #3-79, #11-79, #30-79, #31-79, and #7-80**.

"It is well settled that the processing of a grievance is part of the duty to bargain in good faith and that a failure to process a grievance is an unfair labor practice. See ***City of Livingston v. Montana Council No. 9*****, 571 P.2d 374, (Mont. 1977)**." **ULP #20-86**.

"The "obligation to bargain in good faith includes the duty to comply with the grievance-arbitration procedure contained within the existing Collective Bargaining Agreement**, *Chicago Magnesium Casting Company v. NLRB*, 103 LRRM 2241, 612 F.2d 1, 19480 CA 7**; ***NLRB v. South Western Electric Cooperative, Inc.*****, 122 LRRM 2 747, 794 F.2d 276, 1986 CA 7**." ULPs #19-88 and #4-89.

"The grievance procedure is a part of the continuing collective bargaining process, ***Steel Workers v. Warrior Navigation*****, 46 LRRM 2416, 363 US 574, 1960**. An employer has the same obligation to bargain collectively over grievances as over the terms of the agreement, ***City of Livingston v. Montana Council No. 9*****, 100 LRRM 2528, 571 P.2d 374, 174 Mont. 421**." **ULP #19-88**.

See also **ULP #14-87**.

72.511: Refusal to Bargain in Good Faith – Continuous Duty to Negotiate – Subjects Not Covered by Agreement

"The Complainant … alleges … that the Employer refused to negotiate a supplemental agreement to the already existing supplement contract between the two parties and further that this refusal was in violation of Section **59-1605(1)(e), RCM, 1947** …. Critical and central to this case are the words of the Supreme Court, 'collective bargaining is a continuing process…. [T]his process may involve among other things, day to day adjustments in the contract and working rules, resolution of problems not covered by existing agreements, and protection of rights already secured by contract.' … These static qualities are the negotiated contracts. They should be regarded as the 'framework' within which the process of collective bargaining may be carried on. Yet … [they] are themselves susceptible to change." **ULP #13-74**

"[T]he duty to bargain during the term of the agreement has generally been limited to subjects which were neither discussed nor incorporated into the contract …. The contract … contains a seniority clause…. I cannot find any obligation by the city to bargain on the subject…. But … the problem is one of enforcement of contractual and statutory rights. Therefore, I must conclude that there was no refusal to bargain because there was no obligation to bargain on the subject." **ULP #3-79**

"[T]he refusal of the State to make the first move would not necessarily evidence bad faith…. No where … do I find any requirement that participants to collective bargaining must act like those around a bridge table or a poker table and follow a preordained course of bidding or betting…. [The] record reflects hard bargaining…. The Union's charge on this issue is dismissed." **ULP #11-79**

In **NLRB vs. Herman Sausage Co. (275 F.2d 229, 45 LRRM 2829, 1960)** the 5th Circuit Court of Appeals said: 'The heart of this type of case … is the fact question of good faith…. [M]ake certain that the record actually and substantially supports the charge….'." **ULP #30-81**

See also **ULPs #6-77, #43-79, #16-81, and #33-81** and **ULP #3-79 District Court (1981) and Montana Supreme Court (1982).**

72.53: Refusal to Bargain in Good Faith — Indicia of Good/Bad Faith and Surface Bargaining

"Thirty years ago the U.S. Supreme Court spoke to this very point. 'Good Faith necessarily requires that claims made by either bargainer should be honest claims.' *NLRB v. Truitt Mfg. Co*. . . ." **ULP #19-85.**

"Closely aligned with the bad faith bargaining/totality of conduct concept is the concept of surface bargaining." **ULP #19-85**.

72.530: Refusal to Bargain in Good Faith – Indicia of Good/Bad Faith and Surface Bargaining – Authority of Representative [See also 09.11, 11.31, and 41.22.]

The State Department of Highways did not engage in bad faith bargaining by insisting that the concurrence of the Highway Commission was necessary to ratify any agreement negotiated by the Director of the Department of Highways. **ULP #3-74**

Even though some employees are under a new employer, the failure to notify the union of a change is bad faith bargaining and therefore the new employer is bound by the contract. **ULP #18-75**

"[T]he Board's negotiators were not empowered to carry on negotiations but merely to act as conduits of information to the Board. They had no power to make offers nor to grant concessions…. The Board did authorize its negotiators, that is they were the official negotiators for the Board; the Board did not however clarify what functions the team was authorized to perform nor which powers the team was authorized to exercise…. Numerous National Labor Relations Board decision relating to the duty of negotiators make clear the responsibility of a negotiating team to be empowered to make meaningful negotiations." **ULP #14-76**

"The chief executive of Butte-Silver Bow is the proper bargaining representative for the public employer of Butte-Silver Bow employees." **ULP #17-773**

"Lack of authority on the part of the management negotiator is not considered a per se violation…. In this case, the state negotiator's questionable authority combined with the facts surrounding the unilateral imposition of the matrix on the teachers leads to the conclusion that the State of Montana bargained in bad faith with the teachers at Pine Hills and Mountain View schools." **ULP #33-81**

"The Sheriff of Butte-Silver Bow is the designated authorized representative of the employer pursuant to **39-31-301 MCA**." **ULP #45-81**

See also **ULP #33-76**.

"Failing to give negotiators sufficient authority to carry on meaningful bargaining is considered by the NLRB and the courts as factors in surface or bad faith bargaining." The City of Great Falls violated the Montana Collective Bargaining for Public Employees Act by failing "to invest its bargaining team with meaningful bargaining authority." **ULP #19-85**.

"Defendant Broadwater County first negotiated with the Complainant Union through the County Commissioners. Sheriff Thompson was then appointed as the bar gaining representative. While District Court proceedings concerning the temporary restraining order were underway, County Attorney Flynn appeared to be the bargaining representative. The Complainant Union was also falsely notified a professional negotiator would be representing the County. Such tactics by an employer are considered a violation. ***NLRB v. Fitzgerald Mills*, 52 LRRM 2174 (CA2 1963), cert. denied 54 LRRM 2312 (U.S. S.Ct. 1963)**." **ULP #13-90**.

72.531: Refusal to Bargain in Good Faith – Indicia of Good/Bad Faith and Surface Bargaining – Evasive Tactics and Delay

The refusal to continue negotiations because on or both parties may have filed an unfair labor practice charge is a delaying tactic, which is grounds in itself for an unfair labor practice charge. **ULP #4-76**

"Even though Defendant officials, in raising the issues allegedly precluding their duty to bargain at this time, may not have explicitly refused to bargain with this union there have been delays and such delays were not adequately defended by the evidence in the hearing. Such delay, therefore, amounts to a constructive refusal to bargain…." **ULP #17-77**

"With the School District making a contract proposal some nine days after the union made their first contract proposal … I find the School District was neither dilatory nor evasive in its dealings with the union." **ULP #30-81**

See also **ULPs #25-76 and #11-79**.

"[S]urface bargaining. . . has been found to include such actions as (1) the employer's offer merely reiterating existing practices, and unduly delaying the submission of a written counter proposal, (2) dilatory tactics and an apparent intent to reach an impasse, and (3) failure to designate an agent with sufficient authority." **ULP #19-85**.

"One of the elements of good faith bargaining is a willingness to meet to discuss proposals. There is no evidence that Flathead County ever postponed or failed to attend any negotiation or mediation sessions." **ULP #7-89**.

"Cancellations of bargaining sessions is considered dilatory or evasive tactics and found to be an unfair labor practice. ***NLRB v. M&M Bakeries, Inc.*, 45 LRRM 285 (CA1 1959)**; ***NLRB v. Hibbard*, 45 LRRM 2459 (CA7 1960).**" **ULP #13-90**.

72.532: Refusal to Bargain in Good Faith – Indicia of Good/Bad Faith and Surface Bargaining – Failure to Make Counterproposals

"Not moving from a bargaining position, in itself, is not an unfair labor practice…. In the instant case and within the time frame dictated, there is no evidence that the City expressed the desire not to seek an agreement. The City did adamantly retain its position on the $45 [wage] offer…. [However, the City] has not violated Section **59-1605(1)(3) RCM 1947**.: **ULP #27-77**

See also **ULPs #17-77 and #11-79**.

"Flathead County took a hard bargaining position in its negotiations with the IUOE and IBT. This in and of itself does not constitute an unfair labor practice. Hard bargaining by either party is recognize by the NLRB and BOPA. The question is whether Flathead County bargained in good faith with the labor unions.... [T]he evidence simply does not demonstrate that the County set out to frustrate or impeded negotiations by maintaining the positions it took. It cannot be said that the Unions proved by a preponderance of evidence that Flathead County bargained in bad faith or engaged in surface bargaining." **ULP #7-89**.

72.533: Refusal to Bargain in Good Faith – Indicia of Good/Bad Faith and Surface Bargaining – Imposing Conditions

Demanding that one member of the union take a pay cut as a condition for continued negotiations is an unfair labor practice. **ULP #17-75**

Demanding *written* proposals in negotiations is imposing a condition to bargaining which constitutes an unfair labor practice. **ULP #4-76**

An employer cannot refuse to bargain on staff evaluation procedures even though such have not been included in previous agreements. **ULP #16-75**

"When Defendant was asked to bargain on the change made, it agreed to sit down and negotiate, but only if Complainant agreed not to engage in concerted activities…. Defendant's imposition of **conditions on bargaining was improper and indicated bad faith…." ULP** #17-78

"The School District did violate Section **39-31-401(5) MCA** by insisting the Bigfork Area Education Association first submit a proposal to the School District; if the proposal appeared sincere to the School District or if the negotiations looked profitable to the School District, then the School District would consider a meeting." **ULP #20-78**

"The ultimate question of whether the State's insistence on the stipulation [of 'no strike' during factfinding] as a condition to factfinding amounted to bad faith

is a subjective call and involves 'finding of motive or state of mind which can only be inferred from circumstantial evidence.' (See [NLRB vs. Thompson, Inc.]) … I am not persuaded that the demand for stipulation was for the purpose of frustrating the ultimate agreement…. [T]he charge, although extremely close, has not been proven by a preponderance of the evidence…." Therefore, this charge was dismissed. **ULP #11-79**

"[T]he hearing examiner did not find that either the language of Defendants' March 1, 1982, letter [which allegedly made an 'ultimatum proposal'] or Defendants' presentation of that letter as a proposal at the March 15, 1982, bargaining session could be found violative of Sections **39-31-401(1) and (5) MCA**." **ULP #5-82**

See also **ULP #23-78**.

72.534: Refusal to Bargain in Good Faith – Indicia of Good/Bad Faith and Surface Bargaining – Inconsistency of Position

"I find no evidence that the School District made any switch in any positions…. I also find that the School District never made any commitment to negotiate from the January 1981-June 1981 base when the parties were negotiating the first contract or negotiating a renewal contract. Therefore the School District never switched negotiation bases." **ULP #30-81**

"The School District admits paying some employees by a different formula than the clerical union members…. [T]his hearing examiner is unable to find any authority or case law which states that one employer has to pay all groups of employees, union and non-union, by the same pay rate formula. I find no violation of the Collective Bargaining Act." **ULP #30-81**

See also **ULP #31-82**.

72.535: Refusal to Bargain in Good Faith – Indicia of Good/Bad Faith and Surface Bargaining – Reasonableness, Legality and Sufficiency of Proposals

The "Governor's bargaining agent placed an 'arbitrary limitation of a 14 percent increase…'." The Hearing Examiner was "not persuaded that such a statement was an unfair labor practice." **ULP #11-79**

"[T]he NLRB found that **Deena Artware, Inc., 86 NLRB no. 124, 24 LRRM 1675, 1949**, violated [the Act] … by making an insufficient counter-proposal…. Using the above case as a yardstick … I believe the school district's offer contains sufficient information to adequately judge its value." **ULP #30-81**

See also **ULP #33-76**.

"[S]urface bargaining. . . has been found to include such actions as. . . the employer's offer merely reiterating existing practices and unduly delaying the submission of a written counter proposal. . . ." **ULP #19-85**.

"Since it is decided that holiday pay and hours of work are mandatory subjects of bargaining the question then is whether the proposals of Flathead County are legal proposals." **ULP #7-89**.

"Clearly if Flathead County did implement such a schedule [the four ten work week] without the consent of the employees or their exclusive representative there would be a violation of the law and cause to file an unfair labor practice. In the absence of such implementation the law has not been violated and the language proposed by Flathead County does not violate the statute." **ULP #7-89.**

72.536: Refusal to Bargain in Good Faith – Indicia of Good/Bad Faith and Surface Bargaining – Right to Reject Proposals

See **ULP #11-79**.

See **ULP #7-89**.

72.537: Refusal to Bargain in Good Faith – Indicia of Good/Bad Faith and Surface Bargaining – Time and Place of Meeting

An employer *cannot* claim that the initiation of time and place determinations for negotiations is the duty of the union. It is a mutual obligation. **ULP #6-76**

"When a meeting was cancelled it was announced at the Board meeting and it was assumed an Association member would relay the news to the Association's negotiators. The Board's handling of this matter shows an alarmingly uncooperative attitude." **ULP #14-76**

"I find that an authorized representative of the City (Mr. Grainger) was available and willing to meet [at reasonable times, dates and places] with representatives of the Kalispell Police Protective Association…. [Therefore, the City] has not violated Sections **59-1605(1)(e) and (3) RCM 1947**." **ULP #27-77**

"[T]he fact situation in this matter did not establish that Defendant's setting of the 1982-83 mill levy request was intended to, could reasonably have been interpreted as an effort to, or did in fact impinge upon Complainant's collective bargaining rights." **ULP #5-82**

"It is an unfair labor practice for an employer to limit bargaining sessions to unreasonably short periods of time with considerable intervals between sessions. ***Tennessee Chair Co. v NLRB*, 45 LRRM 1472 (1960)**." **ULP #13-90**.

72.538: Refusal to Bargain in Good Faith – Indicia of Good/Bad Faith and Surface Bargaining – Totally of Conduct

Totality of conduct was established by examining employer conduct with regard to scope of unit plus wages, and bad faith bargaining was found to exist. **ULP #4-76**

" 'The duty to bargain in good faith is an "obligation … to participate actively in the deliberation…." Except in the cases where the conduct fails to meet the minimum obligation imposed by law or constitutes an outright to refusal to bargain, all the relevant facts of a case are studied in determining whether the employer or the union is bargaining in good or bad faith, i.e., the "totality of conduct" is the standard, through which the "quality" of negotiations is tested'." **ULP #5-82**

"The facts in this case are subject to analysis either under the per se violation standard [because a mandatory subject of bargaining must be bargained] or under the good faith/bad faith bargaining/totality of conduct standard." **ULP #33-81**

"[W]e find the employer said that the county saw short of money; that the union, among other things, asked about management belt tightening; that the county, among other things, stated that Greg Jackson would not get a raise; and that Greg Jackson did get a raise…. There is no question that the employer did provide information to the union in response to the union's question. The question involves the issue of misrepresentation and concealment of facts at the collective bargaining table. "[T]his hearing examiner understands that it is an unfair labor practice for an employer to *knowingly* misrepresent any facts about a mandatory subject of bargaining. The employer also has an obligation to correct any facts about a mandatory subject of bargaining which the employer later finds incorrect…. Because the statement in question is about *future intentions* of the employer not to increase the pay of a *non-bargaining unit employee*, because I find no guidance in the NLRB and/or other state case law, because the effect of this case would best be served by the dismissal of the charge, and because I cannot base this case on the 'totality of conduct' I believe this charge should be dismissed." **ULP #31-82**

See also **ULPs #20-76, #19-77, #20-78, #11-79, #30-81, and #18-82**.

"In determining. . . bad faith bargaining the Board of Personnel Appeals, the NLRB and the Courts have adopted a standard whereby each case is judged on the facts in the individual case taking into consideration the 'totality of conduct' of the parties. . . . The totality of the circumstances leads to the conclusion that the City of Great Falls failed to bargain in good faith." **ULP #19-85**.

72.539: Refusal to Bargain in Good Faith – Withdrawal of Proposals

"In the absence of an agreement as to the form in which a contract offer must be made during collective bargain negotiations between these two parties, it must be assumed that a bona fide offer may be in any generally understood oral or written form, either in person, through agents, or oral or through a mediator or other third party…. Mr. D'Hooge's letter … did, in fact, represent a valid contract offer from the Commissioners … [and its] withdrawal … after it was accepted by the bargaining unit represents an unfair labor practice…." **ULP #10-79**

"It is the finding of the Examiner, by a preponderance of evidence that the State did in fact characterize the offer as a 'last, best and final offer' and it is admitted that the State coupled this characterization with the suggestion to the Mediator that the State reserve its right to revert to a lower offer if the offer was not accepted if the Union went on strike…. There is, however, no evidence that the State did in fact revert to a former offer…. [T]hat does not establish that such conduct is an unfair labor practice. The federal case law cited by the State is most persuasive that either party may retract an offer not accepted and revert to a lower offer without being guilty of bad faith bargaining…." Therefore, the charge was dismissed. **ULP #11-79**

"[T]he informal, away from the collective bargaining table discussions have no effect on negotiations until they are formally presented at the collective bargaining table." **ULP #42-81**

"[D]id the City have good cause to withdraw from the tentative agreement of August 17, 1981? … To this hearing examiner, good cause would have to be a matter which is not in the control of one or more of the parties…. In this case, we have cause being the over-sight in the change in language plus an assessment … that no change is needed in the collective bargaining agreement to withhold insurance premiums from the employees' checks. I do not believe this is good cause because the over-sight and the assessments are within the full control of the City." **ULP #42-81**

See also **ULPs #25-76, #33-76, #27-77, #13-80, and #30-81**.

72.54 Refusal to Bargain in Good Faith – Insistence to Impasse on Non-Mandatory Subject [See also 42.2, 42.3, 51, 53.11, 55.92, and 73.45.]

A "gray area" of issues between management and employees makes it impossible, in this case, to say that any non-mandatory subjects were bargained to impasse. **ULP #11-75**

"[A] party may not insist to impasse on the incorporation of a permissive subject of bargaining into the collective bargaining contract, **NLRB vs. Wooster Division of Borg-Warner (1958) 356 U.S. 342, 42 LRRM 2034**." **ULP #20-78**

"[T]he City's insistence upon bargaining on the recognition clause, in the face of the Union's refusal, is a per se violation of Section 59-1605(1)(e) RCM 1947 and … its good faith with respect to attempting to reach agreement must be disregarded. The City's insistence upon bargaining on a permissive subject be disregarded. The City's insistence upon bargaining on a permissive subject is, in substance, a refusal to bargain about mandatory subject." **ULP #19-78**

"[T]he parties were not involved in endless marathon discussions nor were they at impasse." **ULP #33-81**

"The Employer did not insist to impasse on bargaining over a permissive or non-mandatory subject." **ULP 45-81**

"You cannot bargain to impasse over illegal or permissive subjects of bargaining, ***NLRB v. Borg Warner*, 356 U.S. 342 (1958), 42 LRRM 2034**; ***Bigfork Area Education Association v. Board of Flathead and Lake County School District No. 38*, ULP 20-78**; and ***International Association of Firefighters Local 448 v. City of Helena*, ULP 19-78**. Absent impasse a last offer cannot be implemented." **ULP #7-89.**

72.55: Refusal to Bargain in Good Faith – Direct Communications with Employees [See also 41.31, 72.131, 72.151, and 72.17]

The negotiation of a master agreement was not a condition precedent to the issuance of individual teacher contracts, and if there had been a good faith effort to reach agreement, injunction would not lie to prevent school board from issuing individual teacher contracts." **Billings Education Association v. District Court (1974)**

Attaching a contingency (time limitation) to a proposal shown to individual union members which does not allow the Union to effectively respond and thus forces the employees to act individually in order to take advantage of the offer is deemed an unfair labor practice. **ULP #11-75**

"[T]he intention of the Legislature was not to allow the substitution of individual contracts for that of the master agreement…. [T]he function of the individual contract has been relegated to nothing more than a document stating the intention of the teachers to teach in the public school system for the academic year…. The master contract deals with wages, hours, and other conditions of employment; the individual contract deals only with the individual teacher's intent to return to the district and teach for the upcoming year." **ULP #17-75**

"In **State ex rel. Billings Education Association v. District Court (1974), 166 Mont. 1, 531 P.2d 685**, this Court held that nothing in the Professional Negotiations Act for Teachers … required District No. 2 to adopt a master agreement with BEA before issuing individual teacher contracts…. It is not relevant to the present dispute." **ULP #17-75 Montana Supreme Court (1979)**

"Mr. Reagan … has refused to bargain on the ground that the individual contracts with the teachers are binding and sufficient and that the newly certified representative, the Victor Federation of Teachers, must honor these contracts signed prior to the Victor Federation of Teachers' certification." **ULP #20-76**

"By issuing individual contracts containing normal items of collective bargaining, the School Board, in this case, did violate the guidelines of J.I. Case and **ULP #17-75**…. If the individual contract was only a legal formality to hire, I could not sustain the charge. However … a binding contract containing wages with no reference to a master agreement or a rider until a master agreement is reached" violates the guidelines. **ULP #25-76**

"In determining whether or not the discussion between Mr. Fisher and Ms. Vanderburg constituted an unfair labor practice, the following factors were considered: (1) The incident was precipitate totally by happenstance; it was in no way a planned, prepared for, or formal discussion. (2) The incident was, as far as the record indicates, totally isolated, neither recurring with this employee nor happening at any time to any other employee; thereby disallowing any allegation of a continuous, concerted activity of the School Board. (3) The incident was trivial in nature, particular details of the occurrence not being remembered by any of the participants." **ULP #33-76**

"Individual contracts not used for coercive purposes which are consisting with an subservient to the terms of the collective bargaining agreement are permitted. Individual contracts which continue the status quo and do not contain unilateral changes in regards to terms and conditions of employment which are subjects of collective bargaining are permitted." **ULP #16-78**

"An employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed upon by the Board [of Personnel Appeals]." **ULP #16-78**

"I find that AAUP did not waive its right to bargain retirement benefits and that Eastern Montana College's agreements with Mr. Thompson and Mr. Miller contained a provision inconsistent with an existing collective bargaining agreement. Therefore, I find that EMC did violate **RCM 59-1605(1)(e)** in negotiating the retirement agreements with Mr. Thompson and Mr. Miller." **ULP #16-78**

"With the parties agreeing the teachers were already employed, with the wages in the individual teaching contracts not being governed by the master labor agreement, with the issuances of the individual teaching contracts having the effect of telling the teachers they may do as they wished but the School District would determine the work conditions, I find the School District interfered with the collective bargaining process." **ULP #20-78**

"[T]he second full and final offer … was mailed to the individual teachers on or about July 10, 1978 … [and it contained] language different from earlier offers." However, "the School District did not submit provisions to the individual teachers which had not first been submitted to the Complainant at the bargaining table. Therefore, the School District did not violate Section **39-31-401(5) MCA**." **ULP #20-78**

"The 'individual contracts' issued by [the Employer] … surpassed the limits of a proper 'teachers' individual contract' by incorporating wages and hours--two elements strictly reserved for collective bargaining." **ULP #23-78**

"We do not find … [that the letter mailed to each Union member by the Employer contains] the statement of the 'employer's philosophy' but rather, as alleged by the State, comparison of the offers…. The Examiner finds that the letter sent by the State to each Union member was not an unfair labor practice…." **ULP #11-79**

"The Defendant violated Sections **39-31-401(1) and (5) MCA** by calling and conducting meetings with the nurses' aides for the purpose of discussing wages, hours, and other terms and conditions of employment, thereby bypassing the exclusive bargaining agent." **ULP #29-79**

"[A]n employer could not unilaterally negotiate terms different from those in the collective bargaining contract with prospective or newly hired employees." **ULP #7-80**

"In this present matter, the District entered into individual contracts with three teachers which reflect a salary less than that stated in the collective bargaining agreement." **ULP #34-80**

"It is well settled that an employer cannot ignore the recognized collective bargaining agent and negotiate individually with employees on matters inconsistent with the existing collective bargaining agreement. The U.S. Supreme Court held in **J.I. Case Co. vs. NLRB, 321 U.S. 332 (1944) 14 LRRM 501**, that such individual bargaining was in violation of the LMRA, Section 8(a)(5), analagous to Section **39-31-401(5) MCA**." **ULP #34-80** See also **ULPs #20-78 and #23-78.**

The charge referred to a meeting between Linda Keeler and Russell Carlson on July 16, 1981, "Because Linda Keeler is part of the Union negotiating committee, because of the time factor with the upcoming Union meeting, because there is no fact that the School District was trying to leave the impression that the employees would be better off without the Union, I find no violation of Montana's Collective Bargaining Act." **ULP #30-81**

"Regarding the question of whether the Employer committed a violation **of 39-31-401, MCA,** when it set and paid Douglas' salary, not only do I find that there is no evidence to show such a violation, it appears the Employer is paying him less (when his salary is converted to an academic year equivalent) than it pays an assistant professor without a doctorate." **ULP #2-82**

"The parties were engaged in negotiations over the market adjustment factor [MAF] when the employer finally set Spector's salary at an amount which included the MAF …. Defendants violated **39-31-401(5), MCA** when they unilaterally granted the MAF to Professor Spector." **ULP #2-82**

"When an employer recognizes another labor organization as exclusive representative an signs an agreement with that organization it is tantamount to a direct refusal to bargain with the exclusive representative and is clearly bad faith vis a vis the incumbent (certified) union…. It should be noted that in Medo [**Photo Supply v. NLRB (1944)**] the employer was found in violation of both Section 8(1) and 8(5) of the NLRA: interference with employees in the exercise of their rights guaranteed under the act and refusal to bargain. In this case, AFSCME charged the City with failure to bargain in good faith (Section **39-31-401(5))** and failed to charge a violation of Section **39-31-401(1) MCA**." **ULP #34-84**

See also **ULP #30-80**.

72.56: Refusal to Bargain in Good Faith – Direct Communication to Legislative Body – End-Run Bargaining [See also 41.31.]

"In bargaining sessions held after the executive order was issued the state's negotiator stated that wages were set by the executive order [which the Chief of the Labor Relations Bureau had helped draft]. The state appears to have unilaterally imposed it on the teachers who were attempting to bargain." **ULP #33-81**

72.571: Refusal to Bargain in Good Faith – Failure to Ratify – Refusal to Reduce to Writing

"[T]he key phrase in both [Section **39-31-305(2)** and **39-31-306(1) MCA**] is '…any agreement reached.' In other words, on any agreement reached the parties are required to put it in writing and sign it… Here the parties, had not

agreed…. [T]hey did not have a mutual understanding …. Unfortunately, their respective understandings were not congruent." **ULP #13-80**

72.572: Refusal to Bargain in Good Faith – Failure to Ratify – Refusal to Execute

"[T]he School Board violated its understanding with the Association by unilaterally changing the March 12, 1976, agreement and submitting an altered document for legal advice…. Had the March 12, 1976 agreement been deemed legal, it should have been executed." Therefore, the School Board violated Section "1605(3) by refusing to execute a written contract incorporating [the] agreement reached." **ULP #16-76**

"[T]he proposal during bargaining [listing the salary schedule for all 16 teachers] was merely to illustrate how current staff would be affected by the Board proposal and was not a commitment to retain specific programs or staff members…. There is no evidence that listing teachers on the proposal was more than informational. The charge is not proven." **ULP #16-81**

"Using the NLRA for guidance, it is a violation of Montana's Collective Bargaining Act, Section **39-31-401(5) MCA** for an employer to refuse to execute a completed collective bargaining contract." **ULP #42-81**

See also **ULP #29-80**.

"The City has not failed to implement the provisions of the agreed upon language as the language pertains to hours of work for a fourth battalion chief, if that position should be filled. If the position is filled and the hours are not implemented there may well be a contract violation. At this point the Union has failed to prove that the City had failed to implement the agreement." **ULP #14-89**.

72.581: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – Budget Approval [See also 42.43, 53.512, and 55.711.]

The Hearing Examiner "found that the Alteration of Master Contract of May 12, 1980, is reflective of the negotiated settlement…. The District was correct in maintaining that the negotiated settlement was contingent upon passage of the May 20/June 3, 1980, mill levy," not the "new", lower July 15, 1980, mill levy. **ULP #29-80**

"Defendants demonstrated reasonable grounds for setting the mill levy election for April 6, 1982…. Defendants remained willing and able to negotiate wages with Complainant even though the mill levy request was going to be set/was set." **ULP #5-82**

See also **ULP #11-79**.

72.582: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – Change of Employer [See also 11.16 and 41.8.]

The change to a joint City-County Public Library with a new board of trustees is not a defense against bad faith bargaining when the prior agreement contained a grievance clause that is rejected by the new board. **ULP #13-75**

Not informing a union of a change of employer is a failure to bargain in good faith. However, the charge is dismissed in the new employer honors the negotiated agreement. **ULP #18-75**

See also **ULPs #17-77 and #19-79**.

75.583: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – Change of Union [See also 41.9.]

"The NLRB has consistently held that when one exclusive representative succeeds another, the successor organization is not bound by any agreements made by the previous representative…." **ULP #20-76**

See also **ULP #7-78**.

72.584: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – De Minimus

"The duty to bargain over the decision to transfer work to non-bargaining unit members did not arise because there was no significant adverse impact on bargaining unit members…. There was no unfair labor practice because the duty never arose." **ULP #16-84**

75.585: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – Fiscal Condition [See also 53.5 and 55.7.]

"[D]efendants did specify cutbacks in personnel as a possible ramification of increased costs to the District, particularly increased costs related to wages. However, the hearing examiner interpreted this as frank discussion of economic concerns, not as the issuance of an ultimatum." **ULP #5-82**

72.586: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – Impasse [See also 51.]

"The School Board contends that they are under no obligation to bargain once fact finding is called. That may be the case if impasse truly exists…. If the cause of impasse has changed during or after the request for fact finding or mediation, the parties are, once again, under an obligation to bargain even

though the mediator or fact finder has not arrived…. [F]or one party to simply call for third party assistance and then not to bargain with the other party during the interim (except when true impasse exists) would be contrary to the legislative intent and to actual mediation and/or fact finding request experiences." **ULP #25-76**

See also **ULPs #20-78 and #23-78**.

"Given the state of negotiations there is little evidence to demonstrate that additional meetings would lead to a softening by either party. The proposals of the County were reasonably comprehended by the Unions and impasse was reached." **ULP #7-89.**

72.587: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – Lack of Knowledge

"Adopting the [guidelines in **PBM Industries Inc. (1975) 217 NLRB No. 28, 88 LRRM 1549**], the School District is under no obligation to bargain with Local 185 without a request for a bargaining session." **ULP #18-78**

72.588: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – Loss of Majority Status of Union

"I conclude that the loss of majority status was due to the employer's certification petition was present until after the employer's action in August…. To let the School District withdraw recognition and refuse to bargain with the BAEA [Bigfork Area Education Association], would be letting the School District profit from their own wrong doing and would be stating that conditional bargaining, declaring non-existing impasse, making unilateral changes in working conditions and other School District actions had no effect on the bargaining unit….[Therefore,] the School District violated Section **39-31-401(1) and (5)** by withdrawing recognition from the BAEA and refusing to bargain with the BAEA." **ULP #20-78**

"The NLRB has developed a policy that calls for an employer to remain neutral when faced with a claim of majority status from two or more competing unions…." This does "not mean that the employer must stop negotiating with the recognized union because a rival union or group of employees files a status…. The School District violated Section **39-31-401(1) and (2) MCA** by recognizing and negotiating with the BTA [Bigfork Teachers Association] when there was a real question of majority status, by interfering and restraining the Big Fork teachers in the selection of their collective bargaining representative and by dominating, and assisting in the formation of a labor organization, the BTA." **ULP #20-78**

See also **ULP #30-78**.

72.589: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – Non-Mandatory Subject [See also 42.2, 42.3, and 73.477.]

The non-mandatory nature of the subjects cannot be determined on 14 issues presented. Therefore the charge is dismissed. **ULP #11-75**

"The Defendant in this matter did not show the matter of nonrenewal of nontenured teachers was expressly excluded from arbitration. Conversely, the matter is expressly included…." **ULP #30-79**

"[T]he alleged actions of the School Districts in this case, in taking a stance that certain items of negotiation were permissive, in the absence of accompanying allegations that the School Districts refused to discuss those items," did not violate the Act. **ULP #13-83**

See also ULPs #5-77, #6-77, #16-78, #20-78, #31-79, #43-79, and #31-82.

"The City did not violate 39-31-401 (1) or (5) because it had no duty to bargain over the creation of a fourth battalion chief position. The City did have a duty to bargain over hours for the position, but it did not bargain to create the position.... The December 1988 amendment does not set the number of battalion chiefs at four and does not reflect the City's desire to create the fourth battalion chief position through bargaining with the Union on a permissive subject." **ULP #14-89**.

72.590: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – Waiver [See also 09.64, 09.65, 09.66, 21.9, and 73.478.]

"I find no clear and unmistakable language in the contract which can be said to constitute a waiver of Complainant's right to bargain on classifications." **ULP #17-78**

"[T]he District entered into individual contracts with three teachers which reflect a salary less than that stated in the collective bargaining agreement…. The individual contracts cannot act as a waiver to a reduced salary level…. The District bargained individually with employees in violation of Section **39-31-401(5) MCA**." **ULP #34-80**

"Because the complainant, by written agreement, waived, with restrictions, the right to negotiate over subcontracting during the life of the collective bargaining agreement, … a conclusion of law that Lockwood School District did not violate Section **39-31-401 (1)(2) and (5), MCA** is in order." **ULP #9-83**

"The Great Falls Education Association waived its right to press the distinction between permissive and mandatory by giving unlimited authority to the factfinder." **ULP #13-83**

"[N]one of the articles [in the collective bargaining agreement] contain 'clear and unmistakable language' waiving the Billings Education Association's rights to object to, or voice a complaint about, or grieve management's actions. It is elementary labor law that a waiver must be in 'clear and unmistakable language'." **ULP #5-84**

"Since the Complainant, in its zipper clause, clearly and unmistakenly waived its right to bargain over any matter, including layoffs and reductions in hours, the Department of Justice was not required t o engage in bargaining over its decision to impose three days leave without pay on various highway patrolmen. Therefore, no unfair labor practice occurred." **ULP #17-87**.

"A party may contractually waive its right to bargain about a particular mandatory subject. ***Ador Corp*, 150 NLRB 1658, 58 LRRM 1380 (1965); *Druwhit Metal Products Co.*, 153 NLRB 346, 59 LRRM 1359 (1965)**." **ULP #12-89**.

72.591: Refusal to Bargain in Good Faith – Defenses to Refusal to Bargain Charge – Other

"[T]he City of Great Falls did not violate Sections 39-31-401(1) and (5) MCA by refusing to bargain with the Plumbers Union and the I.B.E.W. Union for the employees working as Plumbers and Inspectors. I conclude this because the complainants are covered by and bound by the Craft Council Contract." **ULP #26-79**

Failure to implement an arbitration award is not a failure to bargain collectively. (This decision cites Section **59-1605(3) RCM 1949**.) **ULP 2-74**. See also **ULP #39-80.**

"The courts have ruled: 'Where the deviation between the unit requested by the union and the unit believed appropriate by the employer is unsubstantial and does not affect the union's majority, it cannot justify the employer in refusing to bargain. (Cites.) The proper course for the employer in those circumstances is to refuse to bargain with respect to those employees whose unit status is disputed, not to wholly refuse to bargain…. (**NLRB vs. Richman Brothers Co., et al., C.A., 7, 387 F2d 809, 67 LRRM 2051 (1967)**]…. Even if we assume that all 26 employees in the contested positions were in favor of no representation and add these votes to the no representation side of the equation, the union's majority status will not be affected." **ULP #30-78**

"The question raised in this proceeding is not whether the employer has refused to go to the table and bargain, but rather, whether it agreed to incorporate certain items into the collective bargaining agreement with the Carpenters. I must conclude that it did not so agree." **ULP #13-80**

"The U.S. Supreme Court in NLRB v. Columbian Enameling … teaches that a union cannot charge an employer with failure to bargain when the union has not requested negotiations…. [W]e cannot find that the employer refused to bargain about the question of possible subcontracting when the Union *did not request* negotiations." **ULP #9-83**

See also **ULPs #18-78, #30-80, and #22-81**.

"The obligation to bargain in good faith does not compel either party to make concessions or to agree to a proposal...." **ULP #14-87**.

"Inasmuch as the evidence in the record does not show that the Defendant refused to comply with the grievance/arbitration procedure contained within the Collective Bargaining Agreement, the preponderance of the evidence does not show that the Defendant failed to bargain collectively in good faith with the American Federation of State, County and Municipal Employees, AFL-CIO, its Montana Council No. 9 and Local No. 256 (AFSCME)." **ULP #14-87**.

"While the respondent had an obligation to bargain with AFSCME it was not under that same obligation to bargain with the Complainants, ***NLRB vs. J.R.R. Realty Company*, 121 LRRM 2940, 785 F.2d 46, CA 2 (19486)**; *NLRB vs. Chester Valley Inc.,* 107 LRRM 3148, 652 F.2d 263, Ca 2 (1981); ***Emporium Capwell Company vs. WACO*, 88 LRRM 2660, 420 US 50 (1975)**." **ULP #14-87.**

"The circumstances of this present matter are similar to those addressed by the Montana Supreme Court in ***Missoula County School District No. 7 v. Lolo Classified Association et. al.*** **No. 89-142 December 12, 1989 (ULP 29-86**). In this present matter, the Association filed Section **39-31-401(1) and (5)** violations alleging the District had not bargained in good faith in negotiating a successor agreement. A successor agreement, however, was executed by the Parties on September 12, 1989. Likewise, in *Missoula County School District No. 7*, *supra*, Section 39-31-401(1) and (5) violations were alleged. The Complainant, Lolo Classified Association, MEA/NEA, alleged that the Defendant, Missoula County School District No. 7, had made unilateral changes to working conditions and, therefore, had not bargained in good faith. The Supreme Court found, however, the parties had resolved the issue subsequent to the filing of the unfair labor practice charge and concluded, 'It appearing that such collective bargaining agreement disposes of the issues involved in this case, making the same moot.'" **ULP #32-88**.

"In complying with the Court Order [declaring two people confidential under 39-31-103 MCA without Board involvement] Butte Silver-Bow has not lived up to its contractual obligation to the Federation and to the employees. Rights and privileges enjoyed under the contract have been taken away from employees without due process and without utilization of the statutory mechanism for determining the composition of bargaining units contained in **39-31-202 MCA**." **ULP #54-89**.

72.6: Unilateral Change in Term or Condition of Employment

"The U.S. Supreme Court held in 1962 that an employer's unilateral change in a condition of employment which is under negotiation may be held to violate Section 8(a)(5) even in the absence of a finding that the employer was guilty of over-all bad faith bargaining because such conduct amounts to a refusal to negotiate about the matter and must of necessity obstruct bargaining. The Court went on to hold that such unilateral actions would rarely be justified by any reason of substance, however, it did not rule out the possibility that there might be circumstances under which such actions could be accepted or justified. NLRB v. Katz…." **ULP #2-82**

"When a situation exists where a unilateral change is made in a condition which is a mandatory subject of bargaining, the NLRB has held that such an action is a per se failure to bargain in good faith. [**NLRB vs. Katz, 369 U.S. 736, 50 LRRM 2177 (1962)**]." **ULP #6-77**

"It is well settled that unilateral changes in mandatory bargaining subjects by an employer is an unfair labor practice…. In contrast, a unilateral midcontract change relating to a permissive bargaining subject is not an unfair labor practice." **ULP #9-84**

"In both Fibreboard and Westinghouse…the Court and the National Labor Relations Board in their analysis placed heavy emphasis on the detriment, or absence thereof, to the bargaining unit." **ULP #16-84**

"The general rule laid down by the U.S. Supreme Court in NLRB v. Katz … is that an employer has the duty to bargain with the representative of his employees before unilaterally changing the terms and conditions of their employment…. Although there is no evidence on the record to support a conclusion that it was customary for the city to transfer work out of the bargaining unit or that there was no substantial variance from the city's past practices, it is clear that the determinative factor in cases such as the case *sub judice* is whether there has been a significant adverse impact on bargaining unit members." **ULP #16-84**

"It is well settled that unilateral changes in mandatory subjects of bargaining by an employer is an unfair labor practice (violation of **Section 39-31-401(5)**

MCA). See ***NLRB v, Katz*, 369 U.S. 736, 50 LRRM 2177 (1962)**." **ULP #13-90**. See also **ULPs #29-86 and #13-89.**

See also **ULPs #17-87 , #34-87, #27-88, #12-89, #31-89, and #3-90.**

72.611: Unilateral Change in Term or Condition of Employment – What Constitutes Change

"Complainant asserts that the change made by Defendant was a unilateral management initiated promotion. Defendant contends the change was a reclassification made under authority of Montana law. The facts … show that the class specifications, which include the positions occupied by the affected employees were changed…. I must conclude that the change was a classification action primarily, which resulted in the promotion of certain employees." **ULP #17-78**

72.612: Unilateral Change in Terms or Condition of Employment – Established Practice [See also 42.45.]

"[T]he providing of free meals to employees of Silver Bow General Hospital was long established as a part of the employees' compensation…. Eliminating the free meals shows a disregard of the 'established bargaining relationship and its attendant obligations' just as much as if the meal policy were spelled out in writing…. Discontinuing the policy of free meals … constitutes a violation of Section **59-1605(1)(e), RCM 1947**." **ULP #17-77**

Once practices are established, an employer is "required to bargain in good faith; unilateral changes cannot be made … even if [the practices] are not contained in the contract; unless … there exists a waiver by the party to whom the duty to bargain is owed. In the instant case … [no waiver] was obtained by Defendant prior to making the change in evaluation procedures." **ULP #43-79**

"[O]n July 1, 1979, the management of Silver Bow General Hospital implemented a new approach to providing nursing services, the Total Patient Care concept. The implementation of the TPC concept was done under the pretext of a normal low census lay off. This action violates Article 18 of the 1978-80 Agreement and constitutes a unilateral change in the terms and conditions of bargaining unit employment by management." **ULP #29-79**

"[A] unilateral midcontract change relating to a permissive bargaining subject is not an unfair labor practice." Using the balancing test, the hearing examiner found "the payroll deduction of voluntary political action committee contributions to be a permissive subject of bargaining." **ULP #9-84**

"The Complainants contend the Defendants' insurance contribution payment change to only the required contract amount is an unilateral change without bargaining to impasse and therefore, an unfair labor practice." **ULP #1-91**.

See **ULPs #13-89 and #7-91**.

72.613: Unilateral Change in Term or Condition of Employment — Adequacy of Notice of Change

See **ULPs #34-87 and #27-88**.

72.614: Unilateral Change in Term or Condition of Employment – Union Request for Bargaining

"[T]he School Board requested the opening of the contract to negotiate a salary increase for the employee in question…. The Union's response ... [was to ask] to have the entire salary schedule of the contract opened to negotiation and to have a classification made for all jobs. The School Board did not consider this reply to be responsive to their request and proceed to raise the salary of the employee in question following the precedent of raises given to employees who assume positions of greater difficulty or responsibility. I see no evidence that the School Board acted in any way to circumvent or erode the ability of the Union to properly and effectively represent the interests of its members." **ULP #38-76**

See also **ULPs #17-78 and #18-78**.

"[T]he Complainant employees were receiving, pursuant to an employment agreement, $213.00 per month per employee contribution toward health insurance. Less than one month after the U.F.C.W. (Complainant Union) was certified as the exclusive bargaining representative, the Defendant Broadwater County unilaterally reduced the health insurance contribution from $213.00 to $150.00 per month. The facts are clear and undisputed; the Defendant unilaterally altered the terms of an employment agreement even after a request to bargain the subject was made. See also ***Auto Fast Freight, Inc.,* 272 NLRB 561, 117 LRRM 1336 (19484**) wherein the NLRB held the employer in violation of 8(a)(5) for unilaterally reducing the amounts into a health and welfare plan which it was contractually obligated to contribute." **ULP #13-90**.

72.615: Unilateral Change in Term or Condition of Employment – Adequacy of Bargaining

See **ULP #37-81 Montana Supreme Court (1985).**

72.616: Unilateral Change in Term or Condition of Employment – Changes Favorable to Employees

See **ULPs #38-76, #17-78, and #31-82**.

72.62: Unilateral Change in Term or Condition of Employment – Changes Prior to Bargaining Obligation

"The County … violated **39-31-401(5) MCA** when it made the unilateral decision to abolish the program and as a consequence terminate the employment of the individuals affected." **ULP #30-80**

72.63: Unilateral Change in Term or Condition of Employment – Changes During Bargaining

"Unilateral changes by an employer during the course of a collective bargaining relationship concerning matters which are proper subjects of bargaining are normally regarded as 'per se' [without any consideration of good or bad faith] refusals to bargain [NLRB vs. Katz]." **ULP #16-78**

"The School District did violate Section 39-31-401(5) MCA by implementing unilateral changes in working conditions that were unsettled points in negotiations and before impasse was reached." **ULP #20-78**

"[A] unilateral midcontract change relating to a permissive bargaining subject is not an unfair labor practice." Using the balancing test, the hearing examiner found "the payroll deduction of voluntary political action committee contributions to be a permissive subject of bargaining." **ULP #9-84**

See also **ULP #33-81**.

"The parties are negotiating a successor contract and the Defendants' trustees allegedly first found out they had been paying full insurance premiums during a mediation session. The Complainants were advised thereafter that only the contractually required $208.47 would be paid toward medical insurance." **ULP #1-91.**

72.64: Unilateral Changes in Term or Condition of Employment – Changes after Expiration of Contract

See **ULP #37-81 Montana Supreme Court (1985).**

72.641: Unilateral Changes in Term or Condition of Employment – Changes after Expiration of Contract – Continuation of Contract Terms after Expiration

"Wages, however state or paid, are a mandatory subject of bargaining. Therefore, a unilateral change in wages, even following expiration of a

collective bargaining agreement, is a violation of **39-31-401(5), MCA**." **ULP #37-81**

"To not pay a teacher according to the contract's stated method of placement on the pay matrix and in accord with the truth as to how many years experience and college credits that a given teacher actually has, is a unilateral change in a mandatory subject of bargaining." **ULP #37-81**

"*To pay* an automatic wage increment is *not an unfair labor practice*.... To not pay an automatic wage increase, such as a COLA, *is a ULP.*" **ULP #37-81**

"[T]he Forsyth school district's failure to pay returning teachers in the fall of 1981 the automatic step increase to which they were entitled was a violation of **39-31-401(1) and (5) MCA**." **ULP #37-81**

"A matter similar to this [failure to pay step increases based on years of experience provided in the expired contract, in light of provision 13.1] has been previously addressed by the Board of Personnel Appeals in ***Forsyth Education Association v. Rosebud County School District No. 4,*** **ULP 37-81**; ***Forsyth School District No. 4 v. Board of Personnel Appeals and Forsyth Education Association*****, 42 St. Rptr. 21, 692 P.2d 1261 (1985)**. The Supreme Court in *Forsyth v. Board*, *supra*, did not address the heart of the Forsyth case which was whether failure to implement negotiated steps constituted an unfair labor practice. The Supreme Court ruled that because retroactive benefits were paid *Forsyth* was moot." **ULP #29-86**.

"Wages, however stated or paid are a mandatory subject of bargaining. A unilateral change in wages, even following the expiration of a collective bargaining agreement, is a violation of **39-31-401 (5) MCA, *Forsyth*, ULP #37-81**, *supra.*" **ULP #29-86**.

"In *Forsyth*.... the Board concluded that to not implement steps constituted a change from the *status quo* and thus an unfair labor practice. Of primary importance the Board stated: 'Placement on a salary schedule such as the matrix in question is an automatic wage increase determined only by the length of years of experience and current number of credits.'" **ULP #29-86**.

"If as the Board has found, that a pay matrix constitutes a living part of every agreement subject only to meeting the contractual term of the matrix (a year of service), it makes no difference that the contract has language such as in 13.1. Failure to pay an employee according to the contract's stated method of placement on the pay matrix and in accord with the truth as to how many years experience that employee has, is a unilateral change in a mandatory subject of bargaining.... [T]he District committed an unfair labor practice under **39-31-401 (1) and (5) MCA** by failing to implement the negotiated steps." **ULP #29-86**.

"There is a long bargaining history between the Defendant and the two unions. Prior to these most recent negotiations the parties had always succeeded in reaching successor agreements. The agreements were reached after the expiration date of the contracts, however, the County had always maintained the *status quo* pending a successor agreement. There was a good working relationship between the Unions and the County." **ULP #7-89**.

72.642: Unilateral Change in Term or Condition of Employment – Changes after Expiration of Contract – Other Changes in Working Conditions

See **ULP #17-77**.

72.65: Unilateral Change in Term or Condition of Employment – Changes during Term of Contract

"[T]he duty to bargain is an on-going process. Unilateral changes in respect to wages, hours and other terms and conditions of employment by an employer during this process is a clear violation of the Act. [See **NLRB vs. Katz, 50 LRRM 2177 (U.S. Supreme Court 19620**]." **ULP #34-81**

"[T]he District unilaterally established a policy which affected the salaries of employees represented by a collective bargaining representative." **ULP #34-81**

"The allocation of work to a bargaining unit is a term and condition of employment and an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling its duty to bargain." **ULP #16-84**

See **ULP #17-78**.

"The Defendant violated its Section **39-31-401 MCA** duty to bargain in good faith and engaged in an unfair labor practice pursuant to Section **39-31-401(5)** when it unilaterally eliminated a fringe benefit (Workers Compensation supplementation) for certain police officers, including the Complainant." **ULP #34-87**.

"[T]he LEA charged the District with making unilateral changes in working conditions by decreasing teachers' preparation periods without bargaining and in the absence of impasse." **ULP #13-89**.

"Defendant violated Section **39-31-401(5) MCA** by his action of unilaterally altering the terms and conditions of employment relating to health insurance contributions." **ULP #13-90**.

"[T]he courts and the Montana Board of Personnel Appeals have held: '...A unilateral change, that is a change initiated by the employer without bargaining with the union, in a mandatory subject of bargaining is a refusal to bargain in

good faith and is a *per se* unfair labor practice. ***NLRB v. Katz*, 369 U.S. 736 (1962)**." **ULP #7-91.**
"The unilateral change in Ms. Sisk's hours without bargaining with the union was a *per se* refusal to bargain in good faith, an unfair labor practice.... Laurel Public School, Yellowstone County School District 7-70, is found to have violated Section **39-31-401(1) and (5) MCA.**" **ULP #7-91**.

See also **ULPs #17-87, #27-88, #31-89, and #3-90**.

72.651: Unilateral Change in Term or Condition of Employment – Changes during Term of Contract – Change Not Covered by Contract

"Had the School Board established an attendance policy applying to every member under the union contract, then the unilateral initiation of a more dependable method to enforce this attendance policy would have been merely a change from the established rule…. [It] would have been a managerial prerogative…. The facts of this case do not lead to that conclusion. The School Board initiated additional rules, substantially changing old rules on the same subject." **Butte Teachers' Union v. Silver Bow School District (1977).**

See also **ULPs #6-77 and #16-81**.

"Butte-Silver Bow did not have to sit back and comply with the Court Order [the removal of employees from the bargaining unit because the Court determined they were "confidential"] relying on what appears to be a defense of necessity. Butte-Silver Bow had an obligation and perhaps continues to have an obligation to appeal the Court Order.... Butte-Silver Bow committed an unfair labor practice by unilaterally removing Barbara Verbance and Betty Peterson from the bargaining unit. Those actions constitute a violation of **39-31-401(1) and (5) MCA** as well as **39-31-202 MCA**." **ULP #54-89**.

72.652: Unilateral Change in Term or Condition of Employment – Changes during Term of Contract – Repudiation of Contract

"[A]n excellent argument is made to sustain a charge against an employer who refuses to honor a modified agency clause by failing to require an employee to join a union or pay a service fee in lieu thereof when such is required by contract and when the employee is covered by that contract. Were such facts present in the case at hand, a violation of … (1) (2) would certainly be found." **ULP #17-76**

"[A]n employer could not unilaterally negotiate terms different from those in the collective bargaining contract with prospective or newly hired employees." **ULP #7-80**

"Assuming that individual teachers could waive or modify there terms of a collective bargaining agreement by written affidavit, a proposition upon which I decline to rule, attempts to alter the terms of the existing collective bargain agreement via this contractual method were not made. Thus the question of a 'clear and unmistakable; contract waiver is not in issue (See **Timken Roller Bearing Co. vs. NLRB, 352 F.2d 746, 54 LRRM 2785 (6th Cir. 1963) cert. denied, 376 U.S. 971, 55 LRRM 2878 (1964)**)." **ULP #34-80**

See also **ULPs #29-79 and #2-82**.

72.661: Unilateral Change in Term or Condition of Employment – Defenses to Unilateral Change – De Minimus

"Clauses specifying duty hours and schedules are common inclusion in teaching contracts by this contract had no such clause. Were there such a clause, and if the Board were to implement changes of this nature, a violation would exist. The lack of such a clause on the subject, the minor nature of the proposed changes, and the professional nature of the decision to make the proposal cannot sustain the charge of a violation." **ULP #14-76**

72.662: Unilateral Change in Term or Condition of Employment – Defenses to Unilateral Change – Fiscal Necessity

See **ULP #33-81**.

72.663: Unilateral Change in Term or Condition of Employment – Defenses to Unilateral Change – Impasse [See also 51.]

"It is well established law in the private sector that once an impasse is reached an employer may unilaterally implement his last offer to the union so long as he does not go beyond the last offer. See **NLRB vs. Katz, 369 US 736 (1962)**." On October 8th, an impasse existed." **ULP #17-75**

"[I]f during negotiations impasse occurs, then the employer is free to unilaterally implement its last, best, final offer." **ULP #37-81**

The Board of Personnel Appeals "simply ordered that, in absence of an "impasse," the provisions of the expired contract may not be unilaterally changed by the employer." **ULP #37-81 Montana Supreme Court (1985)**

See **ULP #7-89**.

72.664: Unilateral Change in Term or Condition of Employment

When the contract specifies that the employer has the right to determine the quantity of work to be subcontracted and retains "all rights not otherwise

specifically covered…" then an unfair labor practice charge on the grounds of unauthorized subcontracting does not stand. **ULP #3-75**

"In 1981 the School District developed written guidelines for the administration of business leave. This was not improper so long as the written guidelines (a) were based on a reasonable interpretation of the contract, (b) reflected the meaning of the provision as it had been negotiated, and (c) did not depart in substance from the administration of the provision under the unwritten guidelines…. [T]he written guidelines met these criteria." **ULP #19-81**

"Regarding the question of whether the Employer committed a violation of **39-31-401, MCA**, when it set and paid Douglass' salary, not only do I find that there is no evidence to show such a violation it appears the Employer is paying him less (when his salary is converted to an academic year equivalent) than it pays an assistant professor without a doctorate." **ULP #2-82**.

"The employer is allowed to make unilateral changes in wages provided the changes are within the understandings between the parties [C & C Plywood and Katz]…. The understanding between the parties about Greg Jackson's raise was a specific understanding. A specific understanding has control over a general understanding…. I give no weight to the argument that the County was free to increase Greg Jackson's wages for 'a classification reason'" **ULP #31-82**

See also **ULP #18-78.**

"There was nothing in evidence to show conclusively that practices of the District should be interpreted as amending the specific language of the agreement on preparation time. There was no unequivocal, clearly enunciated and acted upon mutual and definite decision to grant middle school teachers two preparation periods.... The District did not violate sections **39-31-401(1) or (5) MCA** when it assigned teachers to supervise study halls and lunch periods during their preparation periods." **ULP #13-89**.

See also **ULP #1-91**.

72.665: Unilateral Change in Term or Condition of Employment – Defenses to Unilateral Change – Management Prerogative [See also 43.9.]

The Employer has the prerogative to determine the quantity of work to be subcontracted. **ULP #3-75**

The transfer and assignment of teachers within a district is a matter of district policy and not of contractual agreement. Unilateral changes are appropriate. **ULP #16-75**

If there were a cause in the contract on duty hours and schedules "and if the Board were to implement changes of this nature [in duties and scheduling for the 1976-77 school year], a violation would exist. The lack of such a clause on the subject, the minor nature of the proposed changes, and the professional nature of the decision to make the proposal cannot sustain the charge of a violation." **ULP #14-76**

The School Board raised an employee's salary "above that specified in the contract. The contract, however, specifies only a floor beneath which an employee's salary cannot be lowered; nowhere is it stated that the contract sets a ceiling above which an employee's salary cannot be raised. In recent history the School Board has raised the salaries of several employees above the contractual minimum. The Union readily concurred in these previous changes." **ULP #38-76**

"Exceptions to the general rule that an employer violates Section 8(1)(5) by making unilateral changes in wages, hours, or other terms and conditions of employment have been recognized by the National Labor Relations Board and federal courts where an impasses in negotiations exists and where the union waived its right to bargain on the subject." **ULP #2-82**

See also **ULPs #4-73, #16-78, #17-78, #43-79, and #16-81**.

72.666: Unilateral Change in Term or Condition of Employment — Defenses to Unilateral Change — Waiver [See also 09.67 and 21.9.]

"Since the Complainant, in its zipper clause, clearly and unmistakenly waived its right to bargain over any matter, including layoffs and reductions in hours, the Department of Justice was not required to engage in bargaining over its decision to impose three days leave without pay on various highway patrolmen. Therefore, no unfair labor practice occurred." **ULP #17-87**.

72.667: Unilateral Change in Term or Condition of Employment – Defenses to Unilateral Change – Other

"Appellant argues one important factor to be taken into consideration in determining the mootness of a case is what the U.S. Supreme Court has called on a number of occasions the 'capable of repetition, yet evading review doctrine. This doctrine is limited to a situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to the cessation or expiration; and (2) there was a reasonable expectation the same complaining party would be subjected to the same action again. Considering the cases cited by both parties, we do not find a sufficient substantial interest to invoke the above doctrine. The Board of Personnel Appeals' finding that, in the absence of an 'impasse,' the School District must continue to pay the salaries of expired collective bargaining contracts pending

agreement on a successful contract, and does not warrant an action by this Court. Here the School District had already budgeted at least the amount in the expired contract for salaries and it suffers no loss**." ULP #37-81 Montana Supreme Court (1985)**

"I cannot agree [with the Employer's claim] that the situation was such that it posed a threat to the very business of the college itself. No disaster would have occurred had it lost Professor Spector's services. On balance, the Employer's duty to bargain in good faith with the Union outweighed its right to disregard that obligation in order to retain one teacher." **ULP #2-82**

See also ULP #33-81.

"[N]either the evidence nor authority cited show that elimination of a fourth position was a mandatory subject of bargaining. A unilateral change in a permissive subject of bargaining is properly pursued through the grievance procedure, ***NLRB v. Katz*, 369 U.S. 736, 50 LRRM 2177 (1962)** as is currently happening." **ULP #14-89**.

"Section **39-31-303 (5) MCA** gives the City the right to unilaterally create positions." **ULP #14-89**.

"The *status quo* at the time the first collectively bargained contract was negotiated did not provide payment for holidays falling on Sunday. The Board did not make a unilateral change, but rather followed the *status quo*." **ULP #31-89**.

"The defendant is prohibited from bargaining with the complainant if the complainant does not enjoy majority status. The record clearly shows that the complainant does not enjoy majority status and therefore, the current Unfair Labor Practice charge is without merit." **ULP #10-90**.

See also **ULP #54-89**.

72.7: Other Unfair Practices

"[B]oth sides breached the collective bargaining agreement…. [V]iolation of a contractual provision is not per se an unfair labor practice and it is to be noted that the Montana statute does not provide such a provision as does the State of Wisconsin." **ULP #11-79**

"[N]either side to a collective bargaining situation has any obligation to disclose to the other its 'bottom line' or 'hole card' in the ordinary situation at the risk of being held to be in bad faith." **ULP #11-79**

72.71: Other Unfair Practices – Refusal to Accept Grievance Arbitration [See also 47.22, 47.71, 47.83, 47.87, 72.76, and 73.51.]

"[The District was in breach of contract when it refused to strike names from the arbitration list." **ULP #5-80**

"[I]t is clear under both state and federal law that an employer is obligated to submit grievances to binding arbitration, if the collective bargaining agreement so provides. However, that is not the issue raised by this charge…. The county did not refuse to process the grievance … [it refused to] abide by the arbitrator's decision…. [B]y the time a grievance has gone into final and binding arbitration, as here, no element of bargaining exists for there is nothing to negotiate." **ULP #3980**

"The collective bargaining agreement does not provide for the arbitration of grievances; therefore the refusal by Defendant to submit the matter to an arbitrator was not a failure to bargain in good faith." **ULP #22-81**

See also **ULPs #2-74, #19-79, #30-79, and #7-80** and **ULP #5-80 District Court (1981).**

72.73: Other Unfair Practices – Refusal to Comply with Statute or Regulation

"[T]he State not only violated its contractual obligation by totally ignored the public policy set forth in the Governor's executive order [in that negotiations were not concluded prior to the construction of the executive budget]. While the Union did not seek a Writ of Mandate, it is clear from the testimony that Mr. Donald Judge [a union representative] was attempting to avoid this very situation." **ULP #11-79**

72.74: Other Unfair Practices – Refusal to Meet and Discuss [See also 41.6 and 73.54.]

See **ULPs #27-77, #18-78, #20-78, and #11-79**.

72.75: Other Unfair Practices – Refusal to Participate in Impasse Proceedings [See also 51.12, 53.24, 55.33, and 73.55.]

See **ULP #11-79**.

72.76: Other Unfair Practices – Refusal to Process Grievance [See also 47.22, 47.83, 47.87, 72.72, and 73.51.]

The new Cit-County Library Board must honor the grievance procedure and process grievances in accordance with the agreement made by the former employer (which was only the City of Billings). **ULP #13-74**

“There are at least two major avenues available to either party of a negotiated contract to render the contract more meaningful and responsive to the work situation at hand…. [1] If a matter has not been addressed in a standing contract, and no exact stipulation or waiver of rights to bargain on the matter is included in the contract, then the matter is a subject susceptible for further collective bargaining. [2] If a provision of a standing contract is disputed by either the employer or the Union, the ‘contractual mechanism’ for the continuing process of collective bargaining is the all important, agreed to, grievance procedure. This avenue … is the route the Union has taken in this case.” **ULP #13-74**

“By refusing, and continuing to refuse, to bargain collectively with the Union through the use of the standing contractual grievance procedure, the Employer did engage and is engaging in an unfair labor practice within the meaning of Section **59-1605(3) of the RCM, 1947**.” **ULP#13-74**

Refusal to bargain collectively through the contractual grievance procedure on the matter of “students experimental painting policy” is an unfair labor practice by the employer. **ULP #1-75**

“The City’s refusal to grant Dyer a grievance hearing [related to his discharge] is then, in effect, a refusal by the City to bargain over conditions of employment….” **ULP #2-75**

“At a minimum … a grievance committee must give to an employee with seniority notice of the dismissal hearing and an opportunity to be heard, so that he may defend against the charges. Dyer received no notice and could therefore prepare no defense to the matter of his discharge…. For the term ‘hearing’ in the collective bargaining agreement to have any meaning, this employee must at least have notice of the alleged work violations, an opportunity to appear and present evidence in his own behalf, a right to cross-examine adverse witnesses, and a written report of the conclusions and rationale of the grievance committee. These procedures are mandated by the collective bargaining agreement which requires a hearing, as well as by ‘common justice’.” **ULP #2-75 Montana Supreme Court (1977)**

“Under Montana’s Collective Bargaining for Public Employees Act a failure to hold a grievance hearing as provided in the contract is an unfair labor practice for failure to bargain in good faith…. The decision of the District Court is reversed and the order of the Board of Personnel Appeals, finding that the city committed an unfair labor practice by not granting appellant Dyer a dismissal hearing, is affirmed.” **ULP #2-75 Montana Supreme Court (1977)**

An employer may not refuse to enter into the arbitration process as specified in the contract on the grounds that the subject matter of the grievance concerns management rights. **ULP #3-76**

"[T]he University of Montana did not commit an unfair labor practice by refusing to go to arbitration…. Both sides seem to be in error in handling the grievance." **ULP #37-76**

"The Montana Supreme Court in **City of Livingston vs. AFSCME, Council 9, 571 P.2d 374, 100 LRRM 2528 (1977)** set forth the following…. 'Under Montana's Collective Bargaining Act for Public Employees a failure to hold a grievance hearing as provided in the contract is an unfair labor practice for failure to bargain in good faith'." **ULP #19-79**

The grievance procedure is one mechanism "which allows employer and employees to arrive at friendly adjustment of all disputes…. [It is] essential for this Board to encourage the enforcement of those contractual provisions wherever possible." **ULP #7-80**

In **ULP #1-75**, "this Board held that when an employer agrees to a grievance procedure, culminating in final and binding arbitration, its refusal to submit a grievance to arbitration is a refusal to bargain in good faith. That position was modified so that this Board would look to the collective bargaining contract to see if the parties agreed to process the grievance in dispute, and in case of doubt the grievance will be ordered processed." **ULP #7-80**

"The Board of Personnel Appeals has consistently held that a refusal to participate in the processing of a grievance through the procedure established in the collective bargaining agreement, including the submission of the matter to binding arbitration, is tantamount to a refusal to bargain in good faith and, therefore, violates **39-31-401(5) MCA**." **ULP #39-80**

"There was simply no evidence on the record that an incident had ever occurred over which the Association had even wanted to file a grievance." The Hearing Examiner dismissed "this unfair labor practice charge for lack of foundation." **ULP #19-81**

"The refusal to process a dispute concerning a labor contract, if it is in violation of the contract, is an unfair labor practice recognized by the Montana Board of Personnel Appeals, the State District Court and the Montana Supreme Court." **ULP #18-83**

"[A] grievance procedure culminating in final and binding arbitration existed between the parties at the time of Wood's termination. This grievance procedure provides the mechanism to decide disputes arising from the collective bargaining agreement. Butte-Silver Bow voluntarily bound itself to the

grievance procedure contained in the collective bargaining agreement by signing that agreement. Failure to live up to this commitment is an unfair labor practice." **ULP #18-83 District Court (1985)**

See also **ULP #30-79 Montana Supreme Court (1982.)**

"In ***City of Livingston vs. Montana Council No. 9,*** **174 Mont. 417, 571 P.2d 374 (1977)**, the Montana Supreme Court held that processing a grievance is part of the duty to bargain in good faith.... The defendant, City of Missoula violated Section **39-31-401 (1) and (5), MCA** by refusing to abide by the terms of the February 19, 1987 grievance settlement." **ULP #6-86**.

"The City of Billings committed an unfair labor practice by failing to process the grievance of James Adkins. See ***City of Livingston vs. Montana Council No. 9*****, 174 Mont. 421, 571 P.2d 374**. In failing to process the grievance the City violated **39-31-401(5)** MCA. Derivatively the City also violated **39-31-401(1) MCA** and **39-31-201 MCA**." **ULP #27-87**.

"Inasmuch as the Complainant/Union failed to move the grievance on to the next step of the grievance procedure the Defendant/Employer did not refuse to process the grievance as there was no request to do so." **ULP #19-88**.

"It has been determined that the Complainant has not been afforded the remedies and procedures available in the Collective Bargaining Agreement's grievance/arbitration provisions. Inasmuch as the Defendant refused to move the grievance on to the next step, the Defendant has refused to process a grievance. In refusing to process a grievance the Defendant has failed in its obligation to bargain in good faith, violated Section **39-31-305** and in so doing committed an unfair labor practice pursuant to Section **39-31-401(5) MCA**." **ULP #4-89**.

"The Defendant did not violate Section **39-31-401(1)(5) MCA** but refused to process the grievance in conformance with the contract terms." **ULP #24-92**.

See also **ULPs #20-86 and #14-87**.

72.77: Other Unfair Practices – Refusal to Supply Information [See also 41.7.]

"[T]he [School] Board had in its possession budgetary information which by law should have been made available to the association's negotiators. The Board did not expressly refuse to provide the requested information, but the failure to make a diligent effort to obtain and provide it reasonably promptly may be equated with a flat refusal. This information need not be in final form by should be relevant information necessary for intelligent negotiations." **ULP #14-76**

"The NLRB has long held that it is the duty of the employer to furnish the union, upon request, sufficient information to enable the union to understand the intelligently discuss the issues raised in bargaining. In this instant case, the City has provided the basic information from which, by means of mathematical calculations, the KPPA [Kalispell Police Protection Association] could derive further specific detailed information." **ULP #27-77**

"I cannot conclude by the preponderance of the evidence that the School District misled or hid facts from the union." **ULP #30-81**

"[T]he National Labor Relations Board and the federal courts impose a duty on an employer to turn over, upon request of the labor organization, information in its possession which is necessary or relevant to the union in discharging its function as bargaining representative…. The duty to disclose applies both during negotiations over the terms of a contract and during the existence of a contract…. Lengthy delays in furnishing requested information will support a conclusion that the employer failed to bargain in good faith; short delays are considered reasonable…. Although the conduct of the Fire Chief in refusing to answer all questions about the terms and conditions of employment of the temporary employees could be termed a technical violation of his duty under the Act, the City did furnish all information requested by the Union within a few days once the Union submitted a formal, written request…. The Union suffered no harm because it received the requested information within a reasonable time and its purpose in requesting the information was not frustrated, i.e., the Union was able to use the information furnished to formulate a timely decision on what its recourse was to be." **ULP #16-84**

"The NLRB and the courts have long since held that unions are entitled to data on nonbargaining unit positions as long as that data is relevant to bargaining issues. . . . [T]he union was entitled to the information. . . . [W]e must conclude that the union specifically asked about the w ages for the exempt employees and was given assurances that those employees would receive the same settlement as the MPEA unit. . . . While the NLRB and the Courts have made it clear that a refusal to supply relevant information is a violation of the Act, there is considerably less clarity on the question of whether it is a *per se* violation or merely evidence of bad faith bargaining." **ULP #19- 85**.

"[S]upplying misinformation has an even more harmful effect than a refusal to supply information at all. . . . The party which is given incorrect information acts believing that the information supplied is correct. The actions. . . will not have the expected result. . . ." The City of Great Falls violated the Montana Collective Bargaining for Public Employees Act by giving "the union incorrect information. This incorrect information led the union to ratify an agreement which would not have been made except for the incorrect information supplied by the City." **ULP #19-85**.